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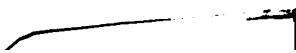
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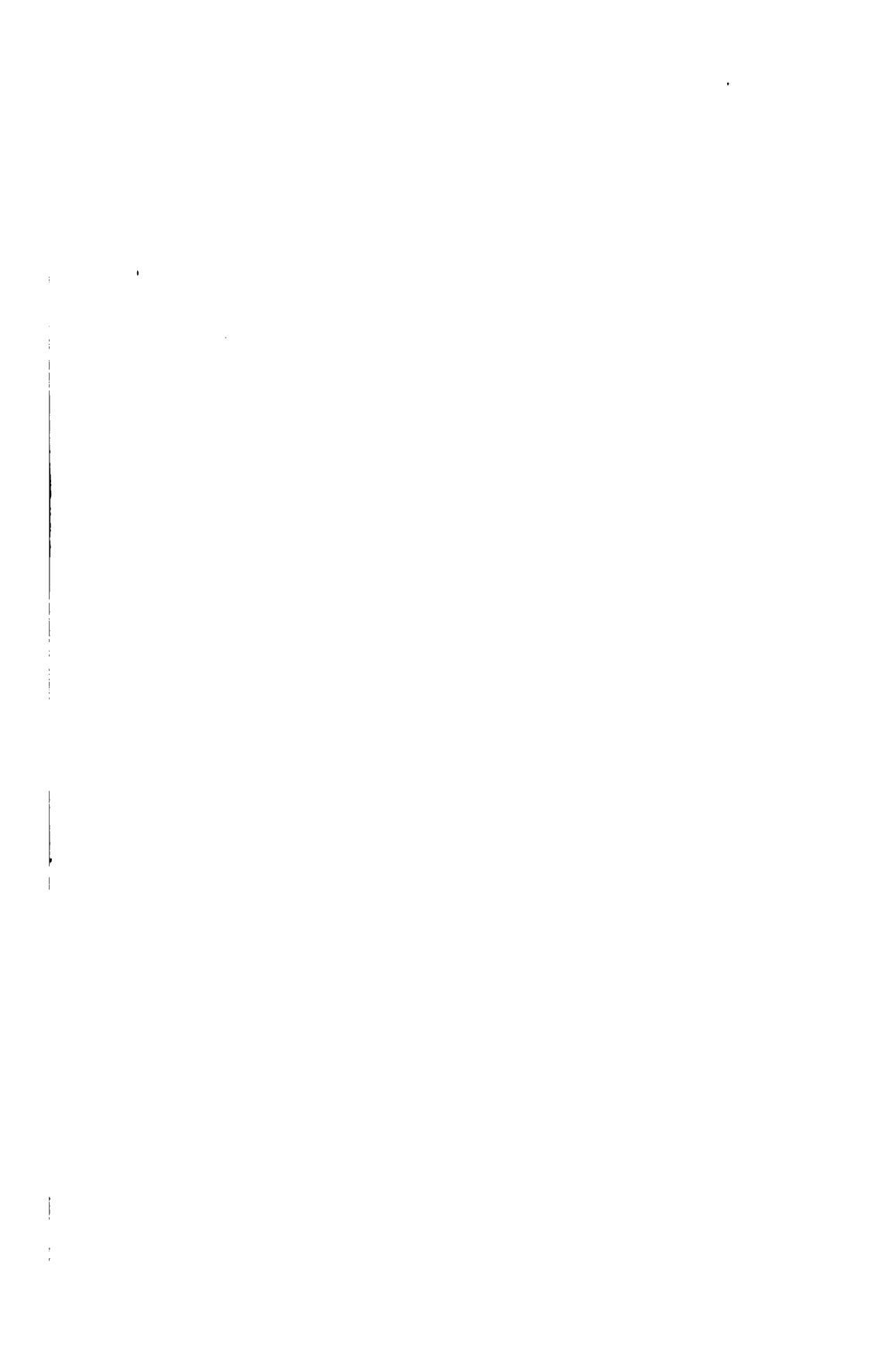
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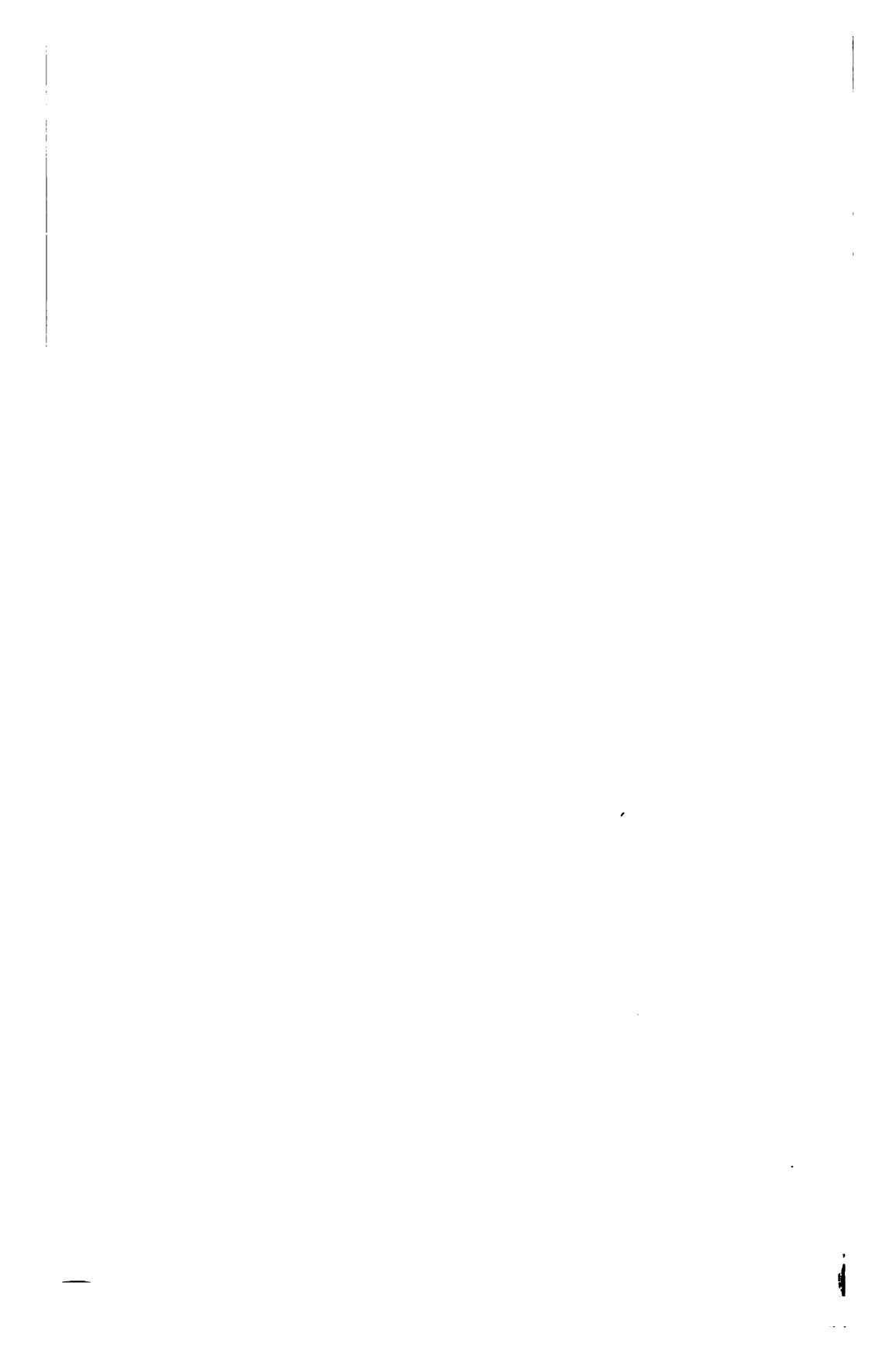
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**CASES OF PRACTICE,**

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

**STATE OF NEW-YORK;**

FROM APRIL TERM, 1794, TO NOVEMBER TERM,  
1805, BOTH INCLUSIVE.

TO WHICH IS PREFIXED,

ALL THE

RULES AND ORDERS OF THE COURT

TO THE PRESENT TIME.

---

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1808.

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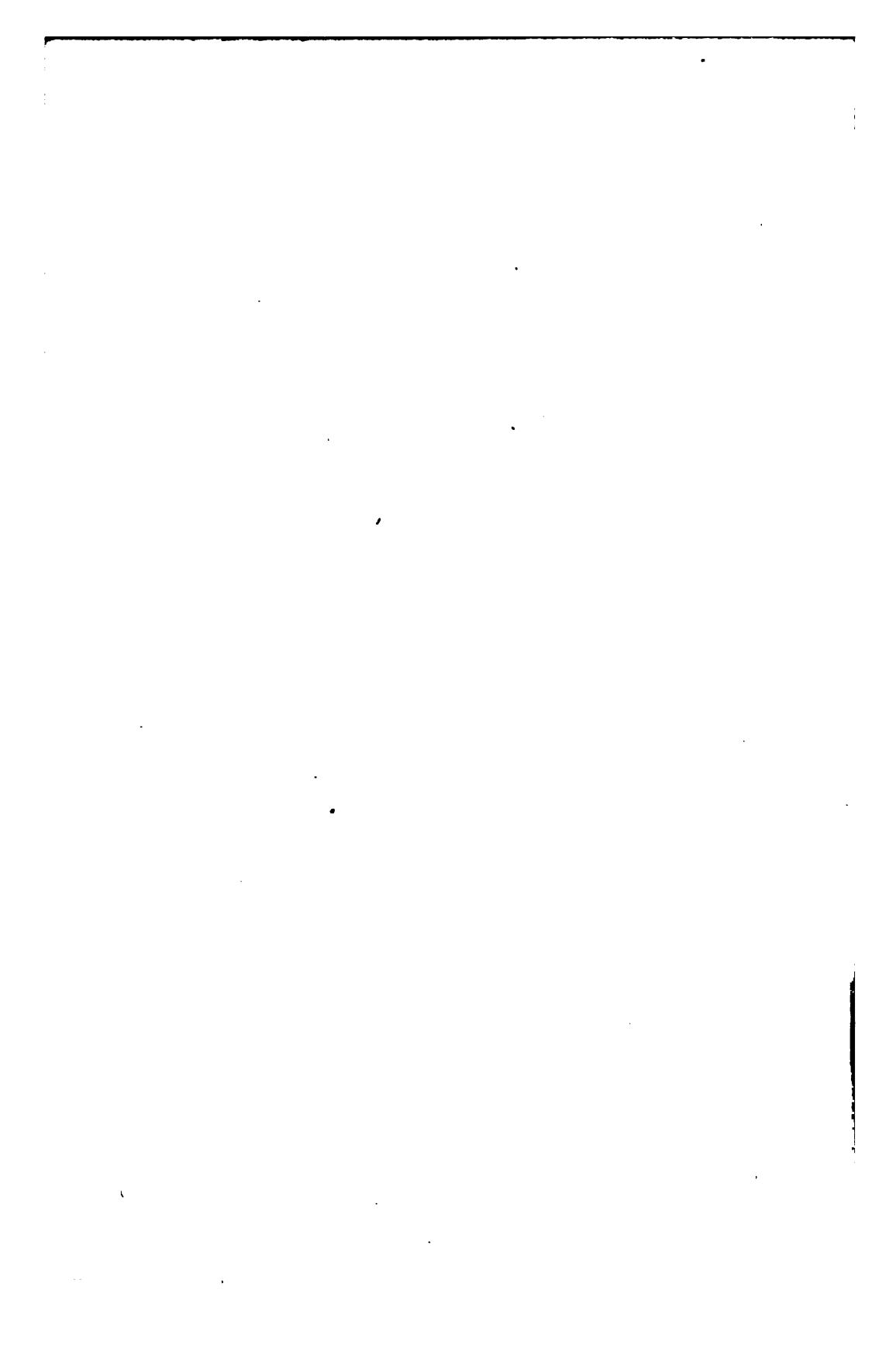
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*A Second Edition of Coleman's Cases of Practice having been called for, the Editor, by the advice of several professional gentlemen, has added the Cases subsequently decided, and printed in the reports of Mr. Caines. It was his intention to have included the cases since 1805, but it was found they would swell the book to an inconvenient size. They will appear in a future volume as soon as a sufficient number can be obtained for that purpose.*

*The present volume, it is hoped, will be found useful to the gentlemen of the bar, and particularly to those who are more immediately concerned in the practice of the court, to whom a knowledge of the judicial decisions by which the proceedings in an action are to be regulated, is not less essential than an acquaintance with the general rules and orders established by the court. To render this collection more useful, all the rules and orders to the present time have been pre-fixed.*

*New-York, July 15, 1808.*



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# RULES

OF THE

## *SUPREME COURT.*

APRIL TERM, 1796.

ORDERED,

I. THAT every rule to which a party would, according to the practice of the court, be entitled *of course*, without showing *special cause*, shall be denominated a *common rule*, and every other rule shall be denominated a *special rule*. That all *common rules*, and all rules by *consent of parties*, shall be entered with the clerk *at his office*, in a book to be provided by him for the purpose, and may be entered at any time, as well in vacation as during a term, and the day when the rule shall be entered shall be noted therein: This rule, however, to be confined to actions in *ejectment*, and personal actions only, so that rules in real actions shall be taken on motion in open court, as heretofore hath been usual.

April Term,  
1796.

II. That every common rule shall be deemed to be taken at the *peril* of the party taking the same, and therefore the clerk shall always enter such rule as the party shall move

## RULES OF THE

April Term,  
1796.

tered in the book for entering common rules ; but where the previous service of a notice of a rule, copy of pleading, or of any other matter shall be requisite, the default shall not be entered unless an affidavit of such service shall be filed ; neither shall it be entered if special bail is required in the cause, and although twenty days from the service of the notice of the rule to plead may have expired, until four days after notice of bail shall have been received ; and if bail shall be excepted to, then, not until four days after the bail shall have justified,

VIII. That the default being duly entered, the party who shall have had it entered, shall not be held afterwards to accept a *declaration* or *answer*, as the default shall happen to be, and may at any time, after four days in term shall have intervened thereafter, have a rule entered for such judgment, as is to be rendered by law, by reason of the default : *Provided nevertheless*, That the court in term, and a judge in vacation, may, on motion of the plaintiff, against whom the rule to *declare*, or of the plaintiff or defendant, against whom the rule to *answer* may have been taken, at any time before the default shall be entered, make such order for enlarging the time to *declare* or to *answer*, as shall be judged reasonable in the case : *And provided further*, That the plaintiff may at any time before the default for not *replying* shall be entered, if the plea shall be a special plea, or ~~a~~ plea in abatement, or within twenty days after service of a copy of the plea, if it shall be the general issue, amend the *declaration* ; and the rule to plead, which may have been taken against the defendant, shall then be deemed to be only from the day of the service of the copy of the amended declaration ; and in like manner where there shall be a demurrer to a declaration, or any other pleading not being a plea in abatement, the party against whom the demurrer shall be taken, may, at any time before the default for not joining in demurrer shall be entered, amend the pleading demurred to ; and further, the respective parties may amend

SUPREME COURT.

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of course and without costs, but shall not be entitled so to amend more than once.\* April Term,  
1796.

IX. That if the defendant shall plead the general issue, and if the plaintiff shall not within twenty days after service of a copy of the plea, either demur thereto, or amend the declaration, or if either party shall in pleading, in any degree after the plea, tender an issue to the country, and if the opposite party shall not demur to the pleading within twenty days after service of a copy thereof, the cause shall, in each of these cases, be deemed to be at issue ; and if a cause shall be put at issue in the vacation, or if it shall be put at issue in term, and there shall not be four days in term thereafter, then in these two cases the four first days in the next term, or if it shall be put at issue in term, and there shall be at least four days remaining in term thereafter, then in this case, the days so remaining in term, shall be the time limited to maintain a rule for a commission to examine witnesses, or for a view, or for a struck jury, whereby the defendant, obtaining the rule, may stay the plaintiff from bringing the cause on to trial, or whereby the plaintiff obtaining the rule, may stay the defendant from serving a notice to bring the cause on to trial ; and where the rule shall be subsequently obtained by the defendant, the plaintiff may bring the cause on to trial, and where it shall be so obtained by the plaintiff, the defendant may serve a notice to bring the cause on to trial, and be entitled to judgment thereupon, notwithstanding the commission may not be returned, or the jury may not be ballotted for the view, or may not be struck, as the case may be ; and if at the time

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\* In January term, 1800, it was decided, that a party cannot add a new plea by way of amendment.

In August term, 1804, *Clipson v. Porter*, it was decided, that a rule to amend is to be entered, though it be a rule of course, and no new rule to plead need be entered.

Whenever the plaintiff amends his declaration, the defendant has his election to plead *de novo*, 1 Caines, 153.

## RULES OF THE

April Term,  
1796.

of giving notice of trial, the jury, on such *subsequent rule* obtained by the defendant, shall not be ballotted for the view, or not be struck, as the case may be, the plaintiff may proceed to trial on the ordinary jury process ; but if the rule shall be obtained within the time above limited, and there shall be a delay in the party obtaining the rule, to have the commission returned, or to have the jury ballotted for the view, or struck, the court may, on motion of the other party, order the rule to be discharged, and otherwise, and further order, as the case shall be judged to require.

X. That where a cause shall be removed from an inferior court, by *habeas corpus*, if the defendant shall not in twenty days after the service of the notice of the rule to appear, or that a *procedendo* issue, put in bail ; or if the bail being excepted to, shall not, within four days after service of the notice of excepting, justify in double the amount of the sum in the writ of the court below, the plaintiff may then, on filing an affidavit of service of the notice of the rule to appear, and purporting also that no notice of bail hath been received, or if bail hath been put in, that the bail hath been excepted to, and hath not justified within four days after service of the notice of excepting, have the default of the defendant in not appearing, entered, and may thereupon, at any time thereafter, take out a *procedendo* of course, and without waiting until the term after the default shall be entered, if it shall be entered in the vacation.

XI. That where any writ, returnable in this court, shall not have been returned on the day of the return thereof, the party who may have sued out such writ, may then take out a rule against the officer or person required to make return of such writ, to return the same within twenty days after service of notice of the rule, or that an *attachment* will be issued against him ; and if the writ shall not thereupon be returned, the party taking the rule, may at any time after the expiration thereof, and on filing an affidavit of service of notice thereof, have the default of the officer

## SUPREME COURT.

or person in not returning the writ, entered, and may, at any time thereafter and without waiting until the term after the default shall be entered, take out an *attachment* of course.

Oct. Term,  
1797.

XII. That no private agreement or consent between the parties, in respect to the proceedings in the cause, shall be alleged or suggested by either of them against the other, unless the same shall have been reduced to the form of a rule by consent, and entered accordingly in the book for entering common rules, or unless the evidence thereof shall be in writing, subscribed by the party against whom it shall be so alleged or suggested.

XIII. That if the want of an original bill shall be assigned for error on a judgment had in this court, upon confession, *Nil dicit*, or *Non sum informatus*, the plaintiff in this court, may file an original bill as of course, and *nunc pro tunc*, as of the term when the suit was commenced.

XIV. That no issues shall be tried at the bar of the court after the first week in term, unless by special leave of the court, for that purpose obtained.

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## OCTOBER TERM, 1797.

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ORDERED,

I. THAT no person shall hereafter be admitted to practise as an attorney of this court, unless he shall have served a regular clerkship of seven years, with a practising attorney of this court; but any portion of time, not exceeding four years, during which a person, after he shall be

## RULES OF THE

Oct. Term,  
1797.

fourteen years of age, shall have regularly pursued classical studies, shall be accepted in lieu of an equal portion of time of clerkship. And the attorney with whom the person is to serve the clerkship, shall file a certificate in the office of one of the clerks of this court, certifying, that the person hath commenced a clerkship with him, and the clerkship shall be deemed to have commenced on the day of the filing of such certificate ; and if the clerkship shall be intended to be for less than seven years, by reason that the person hath pursued classical studies for a portion of time as above mentioned, then an application shall be first made to a judge, who, on examination of the matter, shall make an order to be annexed to the certificate, purporting, that it hath satisfactorily appeared to him, that the person hath pursued classical studies, after he was fourteen years of age, for such a period of time, not exceeding four years, as shall be specified in the order, and thereupon ordering that the clerkship in such case may be for a term which shall remain after deducting from seven years, the time so to be specified in the order. And every person who shall be so admitted to practise as an attorney, and having practised for four years, shall be entitled of course to be admitted to practise as counsel.

II. That every person who shall have regularly pursued juridical studies under the direction or instruction of a professor or a counsellor at law for four years, or shall have been admitted to the degree of counsellor at law, either in this state or elsewhere, shall be admitted to practise as counsel in this court.

III. That no person who shall be admitted to practise as counsel, in consequence of either of the above two rules, shall thereafter practise also as an attorney.\*

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\* This and the rule immediately before it, have been repealed.

## SUPREME COURT.

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IV. That neither of the above three rules shall be deemed to affect any person who shall already have commenced a clerkship, but every such person shall be admitted to practise as an attorney, and also as counsel, in like manner as if the said three rules had not been made.

Oct. Term,  
1797.

V. That every rule heretofore made, respecting the admission of persons who may have served a clerkship or been admitted to practise as attorneys or counsel in another state, to practise as attorneys or counsel in this court, shall cease.

## JANUARY TERM, 1799.

ORDERED,

I. THAT the following *enumerated* motions, to wit, all motions to bring on to be argued a question arising on *special verdict, case reserved* at the trial, *case agreed* between the parties without trial, *demurrer to evidence* or *pleadings, writ of error, or writ in the nature of a writ of error*, comprehending the writ of *mandamus*, and all motions to set aside *non-suit, verdict, inquisition or report*, otherwise than for irregularity only, shall be heard according to the priority of the time when the question arose; the evidence of which, when two or more causes shall be moved in, before leave granted in any one of them to be heard, shall be a note thereof in writing, signed by the attorney in the cause.

II. That with respect to all other motions, the motion first made shall be first heard, and they shall have preference to the *enumerated* motions; but if, there not being any *non-enumcerated* motion about to be heard, the court shall

## RULES OF THE

Jan. Term,  
1799. proceed to hear an *enumerated* motion, then all the *non-enumerated* motions shall lose their preference for the day.

III. That in cases of special verdict, demurrer to evidence, case reserved at the trial, and motion to set aside nonsuit or verdict, the question shall be deemed to have arisen on the day when the verdict in the cause was taken, or nonsuit was granted—in cases of demurrer to pleadings or writ of error, or writ in the nature of a writ of error, the day when the joinder in demurrer, or joinder in error was received by the party demurring, or having assigned the errors—and in cases of return to any such writ and no joinder of error on the record, or motion to set aside inquisition or report, the day when the writ with the return, or when the inquisition or report, was filed.

IV. That where it shall be intended that a *default, nonsuit, verdict, inquisition, report, judgment, execution*, or other proceedings, should be set aside, the matter shall always be brought before the court, on a notice of a motion for the purpose, so that the practice which hath sometimes taken place in those cases, of obtaining a rule against the opposite party to show cause, shall in future be discontinued ; and instead thereof, the party intending the motion, may apply to a judge at his chambers, or to the recorder of New-York, for a certificate, (and which either of them may in their discretion grant) certifying that there is probable cause for staying further proceedings until the order of the court on the motion ; and a service of a copy of the certificate, at the time of or after the service of the notice of the motion, shall thenceforth stay all further proceedings accordingly ; but if such party shall neglect to bring on the motion to be heard during the term, then the proceedings shall not be longer stayed, and he shall moreover be liable to pay costs to the other party, for not having brought on the motion according to notice.\*

\* In January term, 1800, *Case v. Shepherd*, it was decided, that a party to whom a judge refuses an order to stay proceedings, may ap-

## SUPREME COURT.

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V. That the practice of entering a rule, assigning a day, or setting down a cause for argument, shall, in future, be discontinued, and instead thereof, an argument shall always be brought on to be heard in consequence of a notice for that purpose; and every notice of a motion or argument, shall be for the first day in term, or for as early a day in term thereafter, as the circumstances of the case will reasonably permit; and whenever a motion or argument shall go off from day to day, it shall still be entitled to be heard on the notice, without the necessity of a rule for enlarging the time to hear it.

Jan. Term,  
1799.

VI. That whenever it shall be intended to move to set aside a nonsuit or verdict, there shall, in future, instead of the report of the judge, where the same would heretofore have been requisite, be a case, to be prepared by the party intending the motion, and a copy thereof to be served on the opposite party within two days after the trial, and which opposite party may, within four days thereafter, propose amendments thereto, and serve a copy on the party who prepared the case, and who may then, within four days thereafter, serve the opposite party with a notice to appear within convenient time, not less than four days, nor beyond

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peal to the court for such order; but if no order be obtained, and judgment be entered at the time the motion is made to set aside the verdict, &c. the motion then comes too late.

In *Rashbone v. Comstock*, February, 1806, it was decided, that a motion to set aside a report of referees, must be made at the next term after the report is made. 1 *Johnson*, 138. It is so as to all other motions to set aside proceedings, &c. unless some sufficient excuse be shown for the delay.

In January term, 1803, it was decided, that a judge who grants an order in vacation, may revoke it in the same vacation; but the court will not take it into consideration, whether the order was or was not fitly obtained. It must stand until the main question be disposed of.

A judge's certificate of probable cause does not stay the proceedings unless it be accompanied with a notice of the motion. 1 *Caines*, 506.

## RULES OF THE

Jan. Term,  
1799. the first day of the then next ensuing term, before the judge who tried the cause, to have the case and amendments corrected, and the judge shall thereupon correct the same, as he shall deem to consist with the truth of the facts ; but if the parties shall omit within the several times above limited, unless the same shall be enlarged by a judge, or the recorder of *New-York*, the one party to propose amendments, and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as prepared, and the latter to have agreed to the amendments as proposed.

VII. That where there shall be a rule to show cause, or a notice of a motion or argument, if the party on whom the rule or notice shall have been served, shall not appear to show cause, or to oppose the motion, or to argue on his part, he shall be deemed to have renounced his right against the rule, motion, or judgment, claimed by the party having served the rule, or given the notice, and such latter party shall thereupon be entitled to his rule, motion, or judgment equally, as if the other party had appeared, and consented thereto.\*

VIII. That every attorney residing in the city of *New-York*, shall have an agent residing in the city of *Albany*; and every attorney residing in the city of *Albany*, shall have an agent residing in the city of *New-York*; and all

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\* In April term, 1799, it was decided, that the consent, mentioned in the 7th rule, meant only the admission to be presumed against the party declining to oppose or argue. In such cases the judgment is entered in the usual form, and the form of the rule entered by the clerk in his minutes is, "on reading and filing the affidavit of service, &c. &c. and no counsel appearing, &c. Ordered, that the plaintiff (or defendant) take his rule (or judgment) as of course."

As to the practice, on which the 7th rule is founded, see 1 *Salk.* 309, 310. 1 *Lord Raym.* 554. 1 *Lutwyche*, 308. 481. 2 *Lutwyche*, 1300. 3 *Dallas*, 353. *Dean v. Sicard*, in the court of errors, February, 1800.

attorneys residing elsewhere, shall have two agents, the one residing in the city of *New-York*, and the other residing in the city of *Albany*. That no person shall be an agent, unless he shall also be an attorney of this court, and every appointment of an agent shall be in writing, signed by the attorney, and filed in the office of the clerk in the city of *New-York* or *Albany*, wherever the agent shall reside; and the clerk shall have constantly the names of the several agents, and of the respective attorneys appointing them, and the latter in alphabetical order, entered in a book to be kept in their offices for the purpose. That, except services during a vacation in suits where the attorneys for the respective opposite parties shall reside within forty miles of each other, services on the agent shall be as valid, in all cases, as if made on the attorney himself; and if there shall be no agent, the service of the notice may then be, by affixing the same in some conspicuous place in the clerk's office. That where the service shall be on the agent, or by affixing the notice in the clerk's office, it shall be double the time of service\* which would be requisite, if the service was on the attorney himself, and that all services on agents, or in the clerk's office, shall, during a term, be in the city where the term shall be held. This rule, however, not to take effect, until after the first day of the ensuing term of *April*.

IX. That notices or rules of two days shall be abolished, and instead thereof, such notices or rules shall be of four days.

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\* In *April* term, 1800, it was decided, that this rule requiring double time, &c. applied only where an attorney was employed for the defendant and has no agent appointed. It was also decided, that notice of motion for term, though served in the vacation, was within the reason of this rule, and must be served on the agent in the city, where the court is held.

Service on the agent of an attorney who is plaintiff, is equally good as in other suits, and need not be on the plaintiff in person. 1 *Caines*, 252.

Jan. Term,  
1799.

## RULES OF THE

Jan. Term,  
1799.

X. That the practice requiring a term's notice of trial or inquiry, shall be abolished.

XI. That in future no costs to counsel for perusing pleadings or entries shall be taxable against the opposite party, unless there shall be a certificate, signed by the counsel, certifying that he perused the pleadings or entry charged in the bill as *special*, and that in his opinion they were *special*.

XII. In order to provide a remedy against the grievance of having useless counts in the declaration taxed against the defendant, *ordered*, that except where the cause of action shall be for goods sold and delivered, or services performed, there shall not be more than one count in the declaration taxed against the defendant for each distinct cause of action, and where there shall be more than one count for the same cause of action, the attorney for the plaintiff may, in such case, elect the count to be taxed—That where the attorney for the plaintiff shall claim to have more than one count taxed against the defendant, he must then produce an affidavit to the judge or clerk, taxing the costs, that the suit was brought for several causes of action to be specified in the affidavit, and he shall then be entitled to have as many counts taxed as there shall be causes of action specified in the affidavit. And further, if there shall have been a trial, and the defendant shall procure a certificate from the judge, certifying the counts on which the plaintiff recovered, or if there shall have been an inquiry, and the defendant shall procure a certificate from the sheriff or clerk, certifying the counts on which the damages were assessed, that then only the counts specified in the certificate shall be taxed against the defendant, the affidavit of the plaintiff's attorney notwithstanding; otherwise, that is to say, for want of such affidavit or of such certificate, such one count in the declaration, as the plaintiff's attorney shall elect, and no more, shall be taxed: Provided, that in the above excepted cases of goods sold

and delivered, or services performed, the plaintiff shall be entitled to have a count in an *indebitatus assumpsit*, and a count on a *quantum meruit* or *quantum valebat*, taxed for each of these respective causes of action, the above restriction of one count only for each distinct cause of action notwithstanding.

Jan. Term,  
1799.

XIII. In order to provide for a case omitted in the rules of April term, 1796, ordered, that in future where a notice of the rule to plead shall be affixed in the clerk's office, if the attorney for the plaintiff shall, before entering the default of the defendant, receive a notice from an attorney that he is retained to defend the suit, he shall be held to serve the attorney for the defendant with a notice of the rule to plead, and with a copy of the declaration, and the rule for pleading shall be from the time of such service, so that the time, for which the notice of the rule to plead, may have been affixed in the office, shall not be taken into computation.

XIV. That where a suit shall be commenced for a non-resident plaintiff, before security for costs, by a sufficient householder of the state in the sum of one hundred dollars, in the usual form, shall be given, the attorney shall be deemed to have become security for costs; and where, at any time pending the suit, the plaintiff shall remove out of the state, and the attorney shall thereafter proceed in the cause before such security shall be given, he shall in such case also be deemed to have become security for costs; but he shall not, in any case, be liable to an amount exceeding one hundred dollars, or where, if there shall be a plurality of plaintiffs, none of them shall be resident within the state.

**RULES OF THE**

**Oct. Term,  
1802.**

**OCTOBER TERM, 1802.**

**ORDERED,**

THAT when the plaintiff stipulates to bring his cause to trial, he shall, within twenty days from the time of demand made, pay to the defendant the costs ordered to be paid thereon; and if the same be not paid within that time, on demand and on service of a certified copy of the rule to pay costs and the taxed bill, the defendant, on filing an affidavit of such demand and non-payment, may, after the expiration of the said twenty days, enter judgment as in case of nonsuit, as of the preceding term.

**JANUARY TERM, 1803.**

**ORDERED,**

THAT every attorney, when he gives notice of the argument of any enumerated motion, shall furnish the clerk residing in the city where the court is held, with the date thereof, who shall, by the first day of the term, make a calendar of all causes which may be noticed, according to such dates. Causes of the same date shall be placed on the calendar in the order in which they are received by the clerk. Each cause shall be argued according to its standing on the calendar, if the party entitled to bring it on be ready, otherwise it shall lose its preference, and not be called on again until all the others are disposed of. The attorney of either party may give notice of the argument. If any cause be inserted in the calendar during the term, it shall

## SUPREME COURT.

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not take place, whatever may be its date, of any other cause Jan. Term,  
on the calendar at the opening of the court, 1803.

**ORDERED FURTHER,** That to every case there shall be added a note of the questions to be made, and to them the argument shall be confined ; if, however, any facts in the case give rise to other questions, these also may be argued ; unless the adverse party object that these are facts not appearing material to a discussion of such new questions, in which case they shall be abandoned, or the case be referred for amendment, if the court shall think it necessary.

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## NOVEMBER TERM, 1803.

**ORDERED,**

THAT every person who shall have regularly pursued juridical studies under the direction or instruction of a professor or counsellor at law within this state, for four years, or shall have been admitted to the degree of counsellor at law in any other of the *United States*, and practised as such for four years in such state, shall be admitted as counsel in this state ; and that the second rule of October term, 1797, be annulled.

**ORDERED,** That in future, the days for non-enumerated motions, be *Monday and Thursday* in the first week of term, and *Friday* in the second week.

## RULES OF THE

Nov. Term,  
1804.

## NOVEMBER TERM, 1804.

ORDERED,

THAT every person who hath been or shall hereafter be admitted to the degree of attorney of this court, and practised as such for three years, shall be admitted to practise also as counsel in this court; and that the *third* rule of *October* term, 1797, as far as the same is repugnant hereto, be repealed.

## FEBRUARY TERM, 1805.

ORDERED,

THAT in future only the oath of office be administered to persons admitted as counsel or attorney in this court.

ORDERED, that in error on *certiorari* under the *ten pound act*, the plaintiff be entitled to have taxed against the opposite party, only for a general assignment of errors, special assignments being unnecessary, as the court is bound to decide on the merits and overlook the defects of form.

ORDERED, that hereafter the defendant shall not try a cause by *proviso*, without a previous rule for that purpose, to be granted by the court, on the usual notice.

SUPREME COURT.

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AUGUST TERM, 1806.

Aug. Term,  
1806.

**ORDERED,**

THAT hereafter no person, other than a natural born or  
naturalized citizen of the *United States*, shall be admitted  
as an attorney or counsellor of this court.

## **BILLS OF COSTS**

**SETTLED BY THE JUDGES TO SERVE AS  
PRECEDENTS.**

### *Costs on Confession of Judgment out of Court.*

	<i>Dols. Cents.</i>
Retaining fee	3 62 1-2
Warrant of attorney	12 1-2
Filing warrant of attorney	12 1-2
Drawing declaration, folio 4	75
Copy to file	25
Copy for defendant's attorney	25
Filing declaration	12 1-2
Copy of oyer to file and filing	37 1-2
Copy for defendant's attorney	25
Motion and rule for judgment	81 1-4
Term fee	62 1-2
Drawing record, folio 4	75
Engrossing same, including declaration and plea, folio 10	1 25
Drawing up judgment and entering on roll	1 12 1-2
Notice of taxing costs, copy and service	25
Copy of bill of costs for defendant's attorney	75
Taxation and attendance	75
Signing roll	25
Filing roll	12 1-2

	<i>Dols. Cents.</i>	<u>Bill of Costs.</u>
Docketing judgment	25	
Drawing execution, folio 4, engrossing and seal	1 87	1-2
Return and filing	25	

**DEFENDANT'S COSTS.**

	<i>Dols. Cents.</i>
Warrant of attorney	12 1-2
Filing warrant of attorney	12 1-2
Drawing common bail-piece, folio 2, engrossing and filing	75
Drawing plea, folio 2, copy to file and filing	62 1-2
Copy for plaintiff's attorney and service	31 1-4
Term fee	62 1-2
Certifying costs	50
Attendance on same	25

**3*****Costs on judgment by default and on assessment of damages.***

	<i>Dols. Cents.</i>
Retaining fee	3 62 1-2
Warrant of attorney	12 1-2
Filing warrant of attorney	12 1-2
Drawing capias, folio 3, engrossing and seal	1 6 1-4
Clerk entering return and filing writ	12 1-2
Sheriff's fees	
Term fee	62 1-2
Crier's fee	21 3-4
Motion for body and rule	81 1-4
Drawing declaration, folio	
Copy of declaration to file and filing	

## RULES OF THE

<u>Bill of Costs.</u>	<i>Dols. Cents.</i>
Motion and rule to plead	81 1-4
Copy of declaration for defendant's attorney and serving with rule to plead	
Drawing affidavit of service of declaration and notice of rule to plead, folio 2	37 1-2
Copy to file, filing and taking affidavit	34 1-4
Reading and filing affidavit	21 3-4
Drawing recognizance-roll, exclusive of decla- ration, folio 5	
Engrossing same and filing	
Clerk searching for bail-piece and filing roll	25
Motion and rule to enter default	75
Term fee	62 1-2
Motion and rule for interlocutory judgment	75
Motion and rule that clerk assess damages	81 1-4
Notice of assessment on defendant	25
Clerk's fee on assessment	1
Brief and fee on assessment of damages	2 62 1-2
Clerk reading and filing report	25
Motion for judgment and rule	81 1-4
Drawing roll, folio 4	75
Engrossing the same with pleadings, folio	
Copy of costs for defendant and notice of taxing	1
Taxation and attendance	75
Signing and filing roll and docketing judgment	62 1-2
Drawing testatum execution, folio 6, engrossing and seal	2
Return and filing	25

*Costs on a Trial at the Circuit or Sittings and Judgment  
thereupon, in the Supreme Court.*

	<i>Dols. Cents.</i>
Retaining fee	3 62 1-2
Warrant of attorney	12 1-2

## SUPREME COURT.

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	<i>Dols. Cents.</i>	<u>Bill of Costs.</u>
Filing warrant of attorney	- - -	12 1-2
Drawing capias, folio 3, engrossing and seal	1	6 1-4
Clerk entering return and filing writ	- - -	12 1-2
Sheriff's fees		
Motion and rule for body	- - -	81 1-4
Term fee	- - -	62 1-2
Crier's fee	- - -	21 1-4
Drawing declaration, folio		
Copy of declaration to file, and filing		
Motion and rule to plead	- - -	81 1-4
Copy of declaration for defendant's attorney and service with rule to plead		
Copy of oyer for defendant's attorney and copy to file and filing		
Drawing notice of rule to plead	- - -	25
Drawing affidavit of service of copy of decla- ration and notice of rule to plead, folio 2	- - -	37 1-2
Commissioner taking affidavit	- - -	12 1-2
Reading and filing affidavit	- - -	21 3-4
Drawing recognizance-roll, folio 5, and en- grossing same		
Clerk searching for bail-piece and filing recog- nizance-roll	- - -	25
Notice of trial for judge	- - -	25
The like for defendant	- - -	25
Note of issue for clerk and service	- - -	37 1-2
Drawing issue-roll, folio 4	- - -	75
Engrossing the same with pleadings, folio		
Drawing nisi prius record, folio 4	- - -	75
Engrossing same with pleadings, folio		
Clerk filing issue-roll and sealing nisi prius record	- - -	25
Drawing venire, folio 4, engrossing and seal	1	37 1-2
Sheriff's fees and return	- - -	1 12 1-2
Drawing subpoena, folio 4, engrossing and seal	1	37 1-2
Drawing ticket, folio 3	- - -	56 1-4

## RULES OF THE

<u>Bill of Costs.</u>	<u>Dols.</u>	<u>Cents.</u>
Entering cause in judge's books	25	
Filing nisi prius record	12	1-2
Motion and rule that cause be made a re-		
manet	81	1-4
Filing venire	12	1-2
Copies of ticket, folio 3, each		
Motion for leave to try cause	62	1-2
If inquest be taken by default then motion that		
the same be entered	62	1-2
Clerk entering default in such case	12	1-2
Clerk entering return of venire and that plain-		
tiff have leave to proceed to trial	18	3-4
Calling and swearing jury	25	
Swearing witnesses		
Reading writings in evidence		
Swearing constables	6	1-4
Entering verdict	18	3-4
Clerk for certified copy of minutes of court	25	
Fee to the clerk of the circuit	2	50
Crier's fees for calling and swearing jury	12	1-2
Attorney's fee on trial	1	50
Counsel's fee on trial	3	75
Jurors' fees	1	50
Brief for trial	1	12 1-2
Drawing postea	75	
Reading and filing postea	25	
Clerk searching for issue-roll to enter judgment		
thereon	12	1-2
Clerk of supreme court filing venire and certi-		
ficate	25	
Motion and rule for judgment	81	1-4
Drawing entries on roll after issue joined, ex-		
clusive of judgment, folio		
Engrossing the same, folio		
Drawing judgment, and entering same on re-		
cord	1	12 1-2

SUPREME COURT.

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	<i>Dols. Cents.</i>	<u>Bill of Costs.</u>
<b>Copy of costs for defendant's attorney and no-</b>		
<b>tice of taxation</b>		
<b>Taxation and attendance</b>	75	
<b>Signing roll</b>	25	
<b>Filing roll</b>	12 1-2	
<b>Docketing roll</b>	25	
<b>Drawing testatum execution, folio 6, engrossing</b>		
<b>and seal</b>	2	
<b>Return and filing</b>	25	

NOTES  
RELATIVE TO THE  
*TAXATION OF COSTS.*

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Notes, &c. IN August term, 1803, the court adopted the following construction as to the taxation of costs, where the sum recovered was not above 100 pounds, under the *fourth section* of the act concerning costs.

1. That no charge be allowed for services, or compensation where the same do not in fact exist in this court, but are exclusively appropriated to the courts of common pleas, as for instance, the charge for *plaints*, and the judge's and *recorder's fees*.

2. That no charge be taxed, unless a like charge for a like service would have existed and been taxable in the courts of common pleas; and therefore, for example, no *circuit record* is taxable in such case.

3. That for a recognizance roll there be allowed one dollar and fifty cents, exclusive of twenty-five cents paid to the clerk for the entry thereof.

In November term, 1803, the judges agreed that sheriffs were entitled to the following fees:

For summoning a struck jury - - - - § 1 87 1-2

For a view - - - - - 1 87 1-2

*For each day*, and for going and returning § 1 25 p. day.

Venire and return - - - - - 1 12 1-2

On a writ of right, for summoning four electors 1

Going to the supreme court with and returning	\$3 p. day.	Notes, &c.
Summoning recognitors	- - - - 1	
Returning each process	- - - - 12	1-2

A *brief* is allowed in all cases of special motions, or arguments to be made or opposed by counsel.

The recognizance-roll is to include the declaration, and the whole is taxable. See 2 *Lilly*, 521. 2. R. K. B. 316.

In *April* term, 1800, it was decided that *one taxation of costs*, in the fee bill, meant that in the cases where the plaintiff might consolidate, and yet proceed separately, he shall have costs taxed but in one suit, and may elect the suit.— It was also decided, that the plaintiff was not entitled to charge for *entries* on the roll, until after issue or judgment.

In *November* term, 1804, the following directions were given to the clerks, relative to the taxation of costs :

1. That where the defendant proceeds in a suit, he must add the judgment to the issue-roll filed by the plaintiff, and is not to be allowed the taxation of a new issue-roll, unless in the opinion of the clerk or a judge, a new issue-roll was necessary.
2. One brief only for trial or argument is to be taxed, though they do not come on according to notice.
3. A certificate of perusing special pleadings and entries, may be given by any counsel, and is not confined to the counsel employed in the cause.
4. When a counsellor is in partnership with an attorney, he shall not certify as to special pleadings and entries, if both their names appear as attorneys on record.

## RULES OF THE

Notes, &c. 5. An admission in writing by the opposite counsel, as to special entries, &c. shall be equivalent to a certificate.

6. The clerk may charge *nine cents* for filing a note of issue.

7. The expense of entering satisfaction, cannot be taxed in the plaintiff's bill of costs.

It was ordered in *February* term, 1805, that *in error on certiorari*, only one general assignment of errors should be taxed. This was taxed by one of the judges, at 4 folio.

In *November* term, 1805, *paper books*, delivered to the court on a motion, *in arrest of judgment*, were allowed to be taxed.

<sup>1 Johnson,  
312.</sup> In *May* term, 1806, it was decided, that the *crier's fees for ringing the bell, and calling the action, at circuits and sittings, were to be taxed.*

<sup>2 Johnson,  
107.</sup> In *November* term, 1806, it was decided that the expenses of *suing out a commission*, to examine witnesses, such as the *affidavit, notice and motion, drawing, engrossing and sealing the commission, &c.* were to be taxed; but that none of the expenses of *executing* the commission could be taxed.

In the case of *Jackson ex dem Lewis and others, against Boyd*, submitted to the chief justice, for taxation, *August 21, 1806*, he decided,

1. That if a cause be noticed at the circuit, and goes off for want of time, the costs must decide the event of the suit.

## SUPREME COURT.

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2. That exemplifications and copies of records, maps, Notes, &c.  
&c. are not taxable against the opposite party. See 2 East,  
259.

Cases made for the argument of a cause are not taxable 2 Johnson,  
under the act for regulating fees, &c. 108.

If several suits be consolidated, and more than 250 dollars be recovered on the leading suit, and less than that sum on the others, the plaintiff will not be entitled to supreme court costs in the latter. 1 Caines, 66.

If a suit be compromised between the parties without the knowledge of their attorneys, and nothing be said about the costs, each party must pay his own costs.

## SURRENDER OF BAIL.

Surrender of Bail. In April term, 1796, the judges adopted the following forms and rules of proceeding, *on the surrender of bail*:

1. Two certified copies of the bail-piece must be made out by the clerk in whose office it is filed, on one of which the judge indorses the following *committitur*.

"The defendant, on the prayer, and for the indemnity of his manucaptors, is committed to the custody of the sheriff of , at the suit of the plaintiff in the plea above (or within) mentioned. Dated," &c.

This *committitur* is to be signed by the judge, when the bail surrenders the defendant to the sheriff, before or in the presence of the judge. It is then delivered to the sheriff to be retained by him. The defendant may surrender himself before the judge, without the act or presence of the bail, and then it is stated to be, "on the prayer of the defendant."

2. If the defendant be *in custody*, and do not appear before the judge, the sheriff must sign the following *acknowledgment* of it :

"I acknowledge that the defendant is in my custody in the gaol of . Dated," &c.

The *proof* of this acknowledgment must be made by a subscribing witness on oath, before a judge or a commissioner, or by a certificate of the judge in whose presence

it was made ; and the *proof* or certificate must be under Surrender of  
the acknowledgement, in the following form : Bail.

“ A. B. the subscribing witness to the above acknowledgement, being sworn, saith, that he saw \_\_\_\_\_, the sheriff of \_\_\_\_\_, or \_\_\_\_\_, deputy of the sheriff of \_\_\_\_\_, (as the case may be) sign the same.

“ Sworn,” &c. or,

“ I certify that A. B. (or C. D. deputy of A. B.) [sheriff of \_\_\_\_\_, signed the above acknowledgement in my presence.” The judge after this signs the *committitur* as above mentioned :

3. The surrender being made as above directed, the judge indorses *on the other copy* of the bail-piece, the following *order* and notice :

“ Let notice be given, without delay, to the plaintiff, that the defendant hath on the prayer and for the indemnity of his manucaptors been committed to the custody of the sheriff of \_\_\_\_\_, at the suit of the plaintiff in the plea above mentioned ; and that unless cause to the contrary be shown by the plaintiff before me at my chambers, in \_\_\_\_\_, on \_\_\_\_\_, at \_\_\_\_\_ o'clock in the noon of that day, an *exoneretur* will be indorsed on the bail-piece accordingly. Dated,” &c. The form of notice is in substance the same as the order, and must be served two days\* before the time specified therein.

4. If the plaintiff appears and shows no cause, or does not appear, and proof be made of the due service of the notice, by affidavit to be annexed to the copy of the bail-piece, on which is the order for the notice, the judge then orders the *exoneretur* to be entered, as follows :

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\* This service must now be four days. See page 13, 9th Rule.



AN ACT  
CONCERNING THE SUPREME COURT.

Passed 24th March, 1801.

I. BE it enacted by the People of the State of New-York, Terms of the represented in Senate and Assembly, That the supreme court of judicature of this state shall be held at the four several terms following, to wit: On the third *Tuesday* of *January*, *April*, *July* and *October* in every year, and that the said several terms of the said court shall continue and be held from the time of the commencement, every day, except *Sunday*, until and including *Saturday*, in the next ensuing week, and that the term commencing on the third *Tuesday* of *January*, shall be called *January term*, and shall be held in the city of *Albany*; and the term commencing on the third *Tuesday* in *April*, shall be called *April term*, and shall be held in the city of *New-York*; and the term commencing on the third *Tuesday* of *July*, shall be called *July term*, and shall be held in the said city of *New-York*; and the term commencing on the third *Tuesday* of *October*, shall be called *October term*, and shall be held in the said city of *Albany*.

II. And be it further enacted, That there shall be in each of the said terms two common days of return only, that is to say, the first day and the *Tuesday* in the next ensuing week of each term, but that the process in proceedings by bill or otherwise, except on original writs, if issued in term, may be tested any day in that term, and be made returnable on any day in the same term, or the next term; and if issued in the vacation may be tested on any day in the preceding term, and be made returnable on any day in the next term.

## ACT CONCERNING

Process returnable before the judges:

Proceedings to be before the same.

Proceedings, except process, may be on paper.

No trial at bar without leave.

Clerks of the supreme court and their duties.

Records and papers how removable to Albany.

Seals of the said court.

**III. And be it further enacted,** That all writs and process returnable in the said supreme court, shall be made returnable as follows, that is to say: "Before our justices of our supreme court of judicature, at the city-hall of the city of New-York," (or, city of Albany, as the case may be) and proceedings in the said court which have been supposed to be before the people of this state, shall be before the justices of the people of the state of New-York, of the supreme court of judicature of the same people.

**IV. And be it further enacted,** That it shall be lawful to use paper instead of parchment in all proceedings in the said court, except as to the process of the same.

**V. And be it further enacted,** That no issue in any civil cause shall hereafter be tried at the bar of the said supreme court, without the leave of the said court for that purpose first had and obtained.

**VI. And be it further enacted,** That there shall be two clerks of the said court, who shall have like powers, be subject to the like duties, and be entitled to like fees for services performed; and that one of the clerks of the said court shall keep his office in the city of New-York, and shall attend the said court and officiate as clerk thereof when the same court shall sit in the city of New-York; and the other of the said clerks shall keep his office in the public building in the city of Albany, and shall attend the said court and officiate as clerk thereof, when the same court shall sit in the city of Albany: And that it shall be lawful for the justices of the same court, from time to time, to direct such records and papers as they shall think proper to be removed from the clerk's office in the city of New-York, and deposited in the clerk's office in the city of Albany.

**VII. And be it further enacted,** That there shall be two seals of the said court, and the descriptions of the same in

## THE SUPREME COURT.

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writing, deposited and recorded in the office of the secretary of this state, shall remain as public records, and that each of the said clerks shall have the custody of one of the said seals, and all process and other proceedings issued under either of the said seals shall be equally valid. *And further,* That all costs and judgment rolls in the same court may be taxed and signed by either of the said clerks.

Clerks to tax  
costs and  
sign rolls.

VIII. *And be it further enacted,* That the recorder of the city of New-York shall be *ex officio* a commissioner, equally authorised and required with a judge of the supreme court, in respect to suits and proceedings in the said court, to do and execute every act, power and trust, excepting taxing costs and signing rolls, which according to the practice of the said court, a judge may do and execute out of court; and also to allow writs of *habeas corpus*, and to admit prisoners to bail in all cases and in like manner as any such judge may do.

Recorder of  
New-York  
made a com-  
missioner to  
do certain  
duties of a  
judge of the  
supreme  
court.

IX. *And be it further enacted,* That the said court shall by one or more commissions under the seal of the same, from time to time as need shall require, empower such and so many persons as they shall deem fit in every county, to take affidavits of any person desirous to make the same, concerning any cause or matter depending, or any proceedings to be had in the said court or in the court of exchequer; and every affidavit so taken shall be of like force as affidavits taken in the said courts respectively, or before a judge thereof; and that every person who shall commit perjury in any such affidavit, shall incur the same penalties as if such affidavit had been made in open court.

Court to ap-  
point com-  
missioners to  
take affida-  
vits :

Effect of  
such affida-  
vits :  
Perjury  
therein pu-  
nished.

X. *And be it further enacted,* That the person administering the government of this state is hereby authorised, at any time during the vacation of the supreme court, or of any mayor's court, court of common pleas or sessions of the peace, in any city or county, if he shall deem it requisite,

Governor to  
change place  
of holding  
courts in case  
of sickness  
or other ca-  
lamity.

**ACT CONCERNING, &c.**

by reason of war, pestilence, or other public calamity, or the danger thereof, that the then next ensuing term or session of any such court should be held at a different place from the one where such term or session would be to be held by law, to appoint by writing under his hand, and to be recorded in the secretary's office, and published in such and so many public newspapers as he may deem requisite for the due notice thereof, such different place for holding such ensuing term or session as he shall deem most eligible, and at any time thereafter during such vacation to revoke every such appointment, and in like manner to appoint a place anew, or leave such term or session to be held at the place where by law it would have been held; and whenever such term or session shall be held at any place so appointed, all process shall be returned, and all persons shall be held to appear at such place equally as if such term or session was held at the place where by law the same was to have been held.

CASES  
OF  
PRACTICE,  
ADJUDGED IN  
THE SUPREME COURT  
OF THE  
STATE OF NEW-YORK.

APRIL TERM, 1794.

*Dobbin v. Watkins.*

ON the trial it appeared that the contract on the <sup>Assumpsit on</sup> part of the plaintiff to *deliver*, and the one on the Stock Contract part of the defendant to *receive and pay for* the stock, had been reduced to *writing*, and mutually signed and interchanged between the parties; and the former was the *consideration* of the latter or of the *assumpsit* by the defendant as charged in the declaration. The plaintiff could not produce the writing, and not having given notice to the defendant to produce it, whereby to entitle himself to prove its contents, he was nonsuited.

B.

April Term,  
1794.

*Ludlow ads. The People.*

THE defendant was indicted at the oyer and terminer in Queen's county for a rape, and in the last vacation he obtained from a judge, *at his chamber*, an allowance of a *certiorari* to remove the indictment into this court, with a view to have a trial by a foreign jury. The *certiorari* was directed to the clerk of the oyer and terminer, and returned by him with the indictment annexed, and the following questions occurring: 1st. Whether a *certiorari* to remove an indictment for *felony* could be allowed, otherwise than on motion in *open court*, and *special cause* shown? 2dly. Whether a *certiorari* to remove an indictment from the oyer and terminer ought not to be directed to and returned by the *commissioners* instead of the *clerk*? 3dly. If the *certiorari* in the present case should be received and *filed* in this court, then how and where must the trial be; whether by *procedendo* to the oyer and terminer, or by *nisi prius* at the circuit, or at bar; and whether a foreign jury could be awarded in a *capital case*? The court permitted the *certiorari* and return to be *lodged* only in court *for the present*, but not as either *formally received* or *filed*; the defendant, however, having submitted the affidavit on which he should ground his motion for a foreign jury, to the previous examination of the judges, and they deeming it insufficient, no opinion was, therefore, given on either of the above questions, and the following order was entered in the cause, viz. "The writ of *certiorari* issued out of this court, in "this cause, directed to *James Fairlie*, clerk of the "court of oyer and terminer and general gaol delive-

IN THE SUPREME COURT.

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"ry, in and for the county of *Queens*, and the return April Term,  
"of the said *James Fairlie* to the said writ, being 1794.  
"read, *Ordered*, that the said writ and return be not  
"received and filed in this court, and that the several  
"matters, intended by the said return to have been  
"certified and returned to this court, be in the same  
"state in which they were before the said writ issu-  
"ed; the said writ and the said return notwithstanding-  
"ing." The *certiorari* and return were thereupon  
entrusted to Mr. Justice *Lansing*, to be by him put  
again into the hands of Mr. *Fairlie* at *Albany*, where  
he resided.

B.

*The People v. Dowelle.*

SEVERAL poor persons appeared on *subpœna* to give evidence against the defendant. The court determined that on a just construction of the statute, they were equally entitled to be paid as if they had appeared on *recognizance*.

B.

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APRIL TERM, 1795.

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*Carnes v. Duncan, Administrator.*

THE defendant pleaded *payment* and *nul tiel record*; and on motion, on the part of the plaintiff, the court ordered the defendant to elect by which of the two pleas he would abide; thereby deciding that

G

## CASES OF PRACTICE

April Term,  
1795. where there are *several* pleas, *nul tiel record* can never be *one* of them. The principle of the decision was declared to be, that *nul tiel record* being a matter, the knowledge of the proof of which the defendant might reduce to *absolute* certainty, it was not within the reason of the statute enabling defendants to plead *several* pleas; for that the sole intent of the statute was to relieve against the hardship of restricting a defendant, having *several* matters of just defence, all of them however of a nature, that the proof of them cannot be previously *positively* ascertained, to rest his cause on *one* of them only.

B.

*Platt v. Platt.*

BENSON, J. The pleadings in this cause are, *narr.* entitled of *October* term, 1794, in *assumpsit*, charged, 1st *September*, 1794, *plea* in abatement, that on the 28th *January*, 1793, the defendant was taken and detained in prison under the custody of the judges and assistant justices of the court of common pleas for the county of *West-Chester*, by virtue of a plaint levied against him in that court at the suit of the plaintiff: that the plaintiff *declared* against the defendant on that plaint, and the plea set forth the *declaration* at large, which is similar to the *declaration* in this court, (with this difference only, that in the latter there is an addition of a count on an *insimul computasset*, and in the former the *assumpsit* is charged on the 1st *January*, 1793;) that the defendant sued out of this court a *habeas corpus* for removing the cause, tested the 9th, and allowed the 27th *August*, 1794, and return-

able the ensuing *October* term; that the *habeas corpus* was returned in that term: and setting forth the return which is in the usual form; that thereupon the defendant was delivered to bail in this court at the suit of the plaintiff in the plea aforesaid, whereupon the plaintiff exhibited the bill aforesaid in this court against the defendant in the plea aforesaid; that inasmuch as it appears by the bill here, that the causes of action specified in the bill, had not accrued before the term of the caption of the defendant by virtue of the plaint, nor before the time when the plaintiff *declared* on the plaint, nor before the day of the *test*, nor before the day of the allowance of the *habeas corpus*; the plea therefore concludes by praying judgment of the *bill*, and that it may be quashed; *demurrer* to the plea, and *joinder in demurrer*.

" It is regularly true that if the plaintiff will himself discover to the court any thing, whereby it may appear that he had no cause of action when he commenced it, his writ shall abate; of his own showing, it is against him." *Hob.* 199. Or as it is expressed by an ancient law-writer, " The writ also falls; if at the time of issuing there was no cause for issuing, because, at the time of dating and issuing, the defendant had no competent action or cause for demanding." *Bract.* 414. as cited in *Thelwall's Digest.* *Lib.* 4. *ch.* 5. *par.* 3. The question therefore between the parties in the present case is, whether the defendant shall, *to that intent*, where the suit hath been removed by *habeas corpus*, allege any act of the plaintiff, or other proceedings, in the court below, or the *test*, or the allowance, of the *habeas corpus*,

April Term,  
1795.

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as the *commencement* of the suit? This question depends on another, viz. Whether, where a suit is removed by *habeas corpus*, it does not then become a *new* suit in the court above, or whether it is not to be considered as the *same* suit, *commenced* in the court below, and *continued* in the court above? With respect to this question, it is clearly laid down, "that "the record itself is never removed by *habeas corpus*, "but remains below, and therefore the plaintiff must "here begin *de novo*," *Salk.* 352. and must not only "declare *de novo*," but in the common bench, must "bring a *new original*." It is part of the condition of the recognizance of bail on a *habeas corpus* in that court, "That the defendant shall appear to a *new original* to be filed." *Inst. Cler.* 409. *Inst. Legal.* 237. *Imp. Pract. Com. Pl.* 641. And I should suppose, if it is now necessary to comply with mere formality or fiction, that where the proceedings are *by bill*, as distinguished from where they are *by writ*, that the *bill* "on which the process used to issue "against the defendant," which is, "to warrant the "declaration," and which, as analogous to the *original writ*, is said to be "the ground-work of the cause," ought to be filed *de novo*. *Boote's Suit at Law*, 14. 17. 34. And although where a suit hath been commenced within the requisite period, and removed by *habeas corpus*, and the period should expire before the declaration *de novo* filed, and thereupon the defendant plead the statute of limitations, "the plaintiff may re- "ply the suit below," *Salk.* 424. and in like manner where a suit is commenced within the period, and abated by the death of the plaintiff before judgment, the period being then expired, "this shall not prevent

" his executors;" yet, the reason is not, that in the former case the suit above is a continuance of the suit commenced below, or that in the latter case, the suit by the executor is a continuance of the suit commenced by the testator, but merely to show, that the plaintiff "had rightfully and legally *pursued* his right."— And I should suppose, for the same reason, that where *priority* of right attaches on bringing a suit, and a suit should be brought and be removed by *habeas corpus*, and in the intermediate time, between bringing the suit in the court below and filing the declaration in the court above, another person should bring a suit against the defendant for the *same* cause, and the defendant should plead that *matter* with intent to *oust* the plaintiff of his *priority*, that the plaintiff might reply, the suit commenced in the court below. The truth is, that whenever right or justice may require it, a suit, removed by *habeas corpus*, may, to *certain intents*, be made to relate to the suit below, but not to it as to the *same* suit *technically continued*, or on the proceedings in which any of those in the court above, are *founded*, in the sense that the count, narration, or declaration is said to be *founded* on the writ, or bill, or plaint, whichever may be the *original* process.

There is, possibly, another question between the present parties, viz. whether the rule is not to be taken *strictly*, that the defendant cannot avail himself of it as *pleadable*, unless the plaintiff *himself discover* that he had no cause of action when he commenced it? *Hob. ut supra.* In which, however, I should understand to be comprehended, as well what the

April Term, 1795. plaintiff must, in the *first instance*, put on the record, as what he is *bound* to discover on *oyer* prayed by the defendant, and also whatever the defendant may *elect* to allege *himself* instead of *praying oyer* of it from the plaintiff, but of which, if it had been prayed, the plaintiff was bound to give *oyer*. *Thel. Dig. lib. 10. ch. 4. Brown. Lat. red. 1. pl. 3. Id. 2. pl. 6. Form. bene. plac. 3.* If the law is so, and I am inclined to think it is, then it is fatal to the defendant's plea; because, (and which it is to be remarked, is decisive, that the *process* is not *continued* from the one court to the other, there being no such thing, where a cause hath been removed by *habeas corpus* as *oyer* in the suit in the court above of any of the matters in the suit in the court below,) the defendant hath no legal *means* to make the matter *of variance* (for of that *nature* is the *matter* of the plea in this case,) appear on the record. *Theloa's Dig. lib. 9. chap. 5.*

I wish, however, to be considered, as not having come to a decided judgment, on this point; my opinion against the defendant, is grounded, wholly on what I have previously advanced.

I think the plea is insufficient, and therefore, that the defendant answer over.

B.

*Price v. Evers.*

IN the court of errors, 1796. Error from the supreme court on a judgment in *assumpsit* by default.

IN THE SUPREME COURT.

47

The plaintiff in the court below had in the *in toto attingens* on the roll, taken judgment for six-pence less

July Term,  
1796.

than the amount of the damages and costs found by the jury, and the costs of increase. The following judgment was thereupon entered in this court, viz.

" This court having heard counsel on both sides, and  
" due consideration having been had of what was of-  
" fered on either side, in this cause, and one of the  
" causes of error assigned being a *mischasing* by the  
" defendant in error, it is thereupon *ordered* by this  
" court, that the record in this cause be amended,  
" whereby to correct such mischasing, as follows,  
" that is to say, by striking out the word *ten* in the  
" judgment between the word *pounds* and the word  
" *shillings*, and inserting the word *eleven* instead  
" thereof; and by striking out the words *and six-*  
" *pence*, after the said word *shillings*. And it is  
" thereupon further *ordered* and adjudged by this  
" court, that the said judgment given in the said su-  
" preme court be and hereby is affirmed: and that  
" the transcript of the said record so amended, be re-  
" mitted, to the end that the record remaining in the  
" said supreme court be also amended in like man-  
" ner: and that execution may be thereupon had ac-  
" cordingly. And it is further *ordered*, that the de-  
" fendant in error pay to the plaintiff in error, his  
" costs of prosecuting the said writ of error to be  
" taxed."

B.

July Term,  
1796.

*Brantingham's Case.*

THE defendant, having been surrendered in discharge of his bail, and thereupon committed to custody, the plaintiff proceeded to judgment, but suffered *more than three months to elapse* after judgment was entered, without charging the defendant in execution. He was then summoned before his honour Mr. Justice Benson, at his chambers, to show cause why a *supersedeas* should not issue, because he had not charged the defendant in execution, within the time prescribed by the 12th section of the act, entitled "An act for the relief of debtors, with respect to the imprisonment of their persons," passed the 13th of *February*, 1789. The plaintiff, after notice of the application, and before the time of attendance, charged the defendant in execution, and on the hearing, showed that for cause.

His honour *Judge Benson*, reserved the question, and stated the case to the judges at a conference, at which they were all present.

They were of opinion that a *supersedeas* ought not to be allowed : That the intent of the statute was to enable the defendant to put the plaintiff to his election, either to charge the defendant's body in execution, or to resort to his estate ; and the plaintiff having made his election before the *supersedeas* was allowed, the defendant was not entitled to his discharge.

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July Term,  
1796.

*Drake v. Hunt.*

THIS action was originally commenced in the mayor's court of the city of New-York, and removed by *habeas corpus*.

Bail had been regularly filed, and *Munro* for the defendant, moved the last *April* term, that the plaintiff be *nonprossed* for not declaring. He cited 2 *Crompton*, 410. 2 *Salk.* 455. *Gilbert's Law of Distresses*, 139. *Cur. ad. vult.*

The court now gave their unanimous opinion, that the cause having been removed to this court without the agency or approbation of the plaintiff, he was not obliged to follow it, and could not be *nonprossed* for not declaring here, as he had never been in court; but that the defendant was not bound to accept a declaration after two terms had elapsed.

*Wendover v. Ball.*

A BAIL piece had been filed, containing the name of one real person, who had, at the same time, filed an affidavit of justification, and of one nominal person. A rule was then taken to bring in the body, or show cause why an attachment should not issue against the sheriff; and now *Wood* for the plaintiff, moved that the rule be made absolute.

*Per Curiam.* The practice of inserting only one real person in bail-pieces, has generally obtained,

**CASES OF PRACTICE**

July Term,  
1796.

but has passed because there has been no opposition to it. It is requisite, *if the plaintiff exacts it*, that two real persons should become bail.

But the sheriff stipulating to put in additional bail, the motion was waived.

*General Rule.*

SATURDAY.

**ORDERED**, That on trials, one counsel only on each side shall examine or cross-examine a witness; and that two counsel only on each side shall sum up the evidence to the jury.

—  
**OCTOBER TERM, 1796.**  
—

*Cohan Administrator ads. Kip.*

A PLEA was drawn and signed, but the defendant's attorney forgot to file it, and a copy without signature was served. A default for not pleading was entered during the last vacation, subsequent to the delivery of the plea.

*Jones* for the defendant, now moved to set aside the default, on the ground of irregularity; he produced also an affidavit of merits.

*Per Curiam.* A plaintiff may accept or refuse an imperfect copy of a plea; and if he accepts it, the

IN THE SUPREME COURT.

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court will compel the defendant to file a perfect plea, <sup>Oct. Term,  
1796.</sup> if that has not already been done. Here appears to have been a mere mistake on the part of the defendant. Let him file a plea *instanter*, and the default be set aside on payment of costs.

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APRIL TERM, 1796.

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*Branson ads. Boardman and another.*

IN this cause, a *demurrer* was filed to the replication; the defendant's attorney, at the same time, applied to the deputy clerk for leave to strike out the *similiter*, but the clerk refused to permit him to do so. Notice of trial was then given, and an inquest taken.

*Jones* for the defendant, now moved that the verdict be set aside for irregularity.

*Per Curiam.* The 9th rule of April term, 1796, provides that "If either party shall in pleading, in any degree, tender an issue to the country, and if the opposite party shall not demur to the pleading, within twenty days after service of a copy thereof, the cause shall in each of these cases, be deemed to be at issue;" but here was a demurrer filed within the twenty days, and the striking out the *similiter* from the replication which had been filed was not necessary. Let the verdict be set aside with costs.

April Term,  
1797

## APRIL TERM, 1797.

*Franklin and another ads. Nore.*

ISSUE was joined during the last vacation, and before notice of trial was received, the defendant served the plaintiff with notice of a motion for a struck jury ; notwithstanding which, the plaintiff proceeded to give notice of trial, and took an inquest.

*S. Jones* for the defendant, moved that the verdict be set aside for irregularity.

*Per Curiam.* The defendant availed himself of the first opportunity in his power to apply for a struck jury, and it was irregular for the plaintiff to proceed after receiving notice of the intended motion. Let the verdict be set aside with costs.

—  
JANUARY TERM, 1798.  
—*Winter v. Carter.*

THIS was an action on bail-bond. The defendant pleaded *comperuit ad diem* ; plaintiff replied *nul tiel record* ; and issue being taken thereon, day was given, by rule entered in vacation, to produce the record on the first day of this term.

And now, on this day, being the *quarto die post*,

The *Attorney General* for the plaintiff, moved that the defendant be called to produce the record.

The court expressed some doubt whether this was to be considered as a *common rule*, within the intent of the first general rule of *April term, 1796*, and took time to consider of it till the succeeding *Monday*, when they ordered judgment for default of record.

Jan. Term,  
1798.

*Oudenarde v. Van Bergen.*

THE plaintiff had filed his declaration in vacation; and the rule to plead having expired, he entered interlocutory judgment the last term, without having first entered a default.

*Spencer* for the defendant, moved to set aside this judgment, on the ground that no default had previously been entered.

On the last day of term, Mr. *Justice Lansing* delivered the unanimous opinion of the court.

" When this question was presented in the first instance, I did suppose that the entry of the default " could not, under the existing rule, have any other " effect, than merely to preclude the opposite party " from pleading; and that the plaintiff might waive " the entry of the default, and enter a rule for judgment.

" Upon further reflection on the subject, and after " carefully examining the eighth rule entered in *April term, 1796*, it appears to me to be the better construction, that the entry of the default is indispensable to entitle the plaintiff to his judgment; the expression being, ' *That the default being duly entered*'

## CASES OF PRACTICE

Jan. Term,  
1798.

"*ed, the party who shall have had it entered, shall not be held afterwards to accept a declaration or answer, as the default shall happen to be, and may at any time after four days in term shall have intervened thereafter, have a rule for such judgment as is to be rendered by law, by reason of the default.*" This imposes it on the party entering the default to file the necessary proofs to evince its regularity ; and if any subsequent question arises on that subject, a resort to those proofs affords a determinate test.

" We are all of opinion that the interlocutory judgment be set aside."

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APRIL TERM, 1798.

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*Kettleas v. North.*

JUDGMENT had been rendered for the defendant on verdict, but the roll had not been filed.

Burr, for the plaintiff, now suggested that he intended to bring a writ of error, and moved for a rule that the defendant procure the roll to be signed and filed in four days, or that the plaintiff have leave to do it.

Rule granted.

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April Term,  
1798.

*Wickham v. Waters.*

GRAHAM moved for a view, on affidavit that *Ejectment.* view was necessary. But as he did not state that boundaries were in question, the court refused to grant the motion.

*Wimble and another v. M'Dougal.*

VAN VECHTEN, for the plaintiff, moved for *Ejectment.* leave to amend the declaration in ejectment, by adding a count on the demise of a person not originally named as a lessor. He mentioned the case of *Jackson ex dem. Quackenbos v. Dennis,* where this was allowed.

Graham, contra.

*Per Curiam.* In the case of *Quackenbos v. Dennis,* it was so ordered, and that is to be considered as a precedent to govern. But it is reasonable that the defendant should be permitted to relinquish his defence, if he chuses to do so, as the introduction of a new party may vary his situation. Let him elect, by Friday next, to abide by or relinquish his plea; and if he relinquishes it, the plaintiff must pay all the costs accrued up to that day.

*M'Gourch v. Armstrong.*

HENRY moved for an attachment against the sheriff of *Montgomery,* on a rule taken by him in vacation to bring in the body by the second day of term: But

**CASES OF PRACTICE**

April Term,  
1798.  
it appeared that notice of such rule had not been  
served twenty days.

*Per Curiam.* Although the printed rules do not reach the case, the sheriff must have twenty days, at least, after service of the notice. Let the plaintiff take nothing by his motion.

*Driggs ads. Van Loon.*

MOTION by *Kirkland* to set aside a writ of inquiry, and subsequent proceedings.

Defendant had retained an attorney after interlocutory judgment, who gave notice thereof; but plaintiff proceeded to execute a writ of inquiry, without giving notice to the attorney so employed.

*Per Curiam.* Whenever an attorney is employed, though it be too late to plead, yet he is entitled to all subsequent notices.

Motion granted.

*Ballard and Parkman, manucaptors of Chapman, ads. Kibbe and Ludlow.*

THIS was an application by bail to surrender their principal, on the following case :

In April term, 1797, *ca. sa.* against the principal was returned *non est.* On which, the plaintiffs issued a *cap. ad resp.* against the bail *jointly*, on their recognizance. This writ was delivered to the sheriff of

*Herkimer*, or his deputy, early in *April* vacation, being <sup>April Terms  
1798.</sup> returnable the last *Tuesday* of *July* then next.

On the 7th of *July*, the deputy having possession of the writ, but not in his pocket, met *Parkman*, one of the bail, and informed him of the writ; on which *Parkman* promised to come to the house of the deputy and *indorse his appearance thereon before the return day*. He accordingly came and indorsed his appearance, but at what time precisely, *Cheeseborough*, the deputy, who is the witness, does not recollect. By the affidavit of *Parkman* himself, it appears to have been two days *after the return day of the writ*. The writ was then returned, with *such indorsement*, but without any return indorsed by the sheriff himself.

In *July* vacation, the plaintiff issued an *al. cap.* against *Ballard*, to answer *simul cum Parkman*, returnable in *October* term, which having been returned "non est," the plaintiffs issued a *testatum* against *Ballard* alone, returnable in *January*, 1798, directed to the sheriff of *Onondaga*, who took him.

*August* 28th, 1797, the defendant's attorney had delivered the plaintiff's attorney a writing intended as a plea in abatement, praying that for want of *an official return*, as well as on account of such *irregular service* of the writ on *Parkman*, the plaintiff's bill might be quashed.

April Term,  
1798. *February* 10th, 1798, the plaintiff's attorney delivered a copy of the declaration filed, against the bail jointly.

*February* 13th, 1798, the plaintiff's attorney received a plea in chief *nil debet*, in behalf of *Ballard* alone; and at the same time another writing, intended as a plea in abatement, in behalf of *Parkman* separately, and so entitled, and grounded upon the before mentioned objection, viz. the want of *official return*.

The proceedings respecting the surrender were as follows :

*January* 13th, 1798, three days before the term, the sheriff of *Herkimer* signed an acknowledgment, that the principal was in his custody, on a surrender by *Parkman*, in behalf of himself and *Ballard*.

*January* 27th, on application of *Ballard* in behalf of himself and *Parkman*, his honour Judge *Benson* made an order for a commitment.

*March* 5th, the sheriff signed a farther acknowledgment, that the principal was still remaining in his custody when the *committitur* came to his hands.

*March* 20th, Judge *Benson* made an order for the plaintiffs to appear and show cause why an *exoneretur* should not be entered. They appeared accordingly, and the case was adjourned over to be argued and determined in open court.

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On this case the following questions were raised : April Term,  
1798

1. Are the defendants now too late in their application ?

2. Can one bail be discharged alone when the application is for the discharge of both ?

3. Will the discharge of one bail operate as a discharge of all ? and if one is fixed, will not the other be so likewise ?

*Curia ad. vult.*

*Per Curiam.* The surrender by *Ballard* is good as to both. If a plaintiff will elect to sue special bail *jointly*, he who is first taken shall have time to surrender till the last is taken also, and till the time allowed him (the last) for surrendering is expired. If he sues them *separately*, then each may be separately *fixed*; or one may be fixed, and the other may afterwards surrender the principal, and be discharged. So that, in fact, the plaintiff may have the body of the defendant in custody, and at the same time go on with a *suit* against the other bail which has been *fixed*. He cannot, however, have more than one satisfaction.

Let the defendants take the effect of their motion, on payment of costs.

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July Term,  
1798.

JULY TERM, 1798.

*Woodman and others ads. Little.*

THIS was a motion to set aside the proceedings on a *scire facias quare non* and two *nihilis* returned, because there had not been fifteen days between the *teste* of the first, and return of the second *sci. fa.* In support of the motion was cited, *4 Durn. and East, 583.*

It was contended in reply, that when proceedings in the original cause are by bill, four days are enough. *4 Durn. and East, 663.*

*Per Curiam.* There must in all cases, be fifteen days between the *teste* of the first, and return of the second *sci. fa.*

*Colden, for the defendant.*  
*Houston, for the plaintiff.*

*Pepoon and another ads. Jenkins.*

RIGGS, for the defendants, moved to quash the writ for want of the clerk's name to it, and Woods, at the same time, moved for leave to amend. He contended that the writ is supposed to be the act of the clerk, and ought not to prejudice the party; and

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cited 1 *Cromp.* 106. and 1 *Durn.* and *East,* 783. July Term,  
1798.  
*Yelv.* 64.

*Per Curiam.* It may be considered as the omission of the clerk, and amendable. Let it be amended, on payment of costs.

*The People at the relation of Thompson v. The  
Judges of the Court of Common Pleas for West-  
Chester.*

AT a previous term, *Woods* had moved for and obtained a rule to stay proceedings on a writ of error in this court, until the common pleas in *West-Chester* could be moved for leave to file a plaint *nunc pro tunc*, the want of which had been the error assigned here. Application had been made to that court for such purpose, and was refused by them, on which *Woods* obtained the rule here to show cause why a *mandamus* should not issue to compel them to allow such application; and now

*Munro* showed cause.

He insisted that the court below had always a discretion in cases of this kind, and that in the present instance, having considered the judgment before them as unjust, had refused the application on that ground, and that therefore it was not a proper case to grant a *mandamus*.

*Per Curiam.* The court below have indeed a discretion, but it is a legal and not an arbitrary one. We

July Term,  
1798. always allow a bill to be filed *nunc pro tunc* when error is brought and that assigned for cause.

Rule absolute.

*Wisner and others v. Wilcocks and others.*

*Ejectment.* OGILVIE moved that *Amos Wilcocks* be admitted to defend *jointly*, on his affidavit that the defendants hold of him as their landlord.

*Riggs*, for plaintiff, opposed the granting a rule, because the affidavit did not specify that *Amos Wilcocks* was *in the receipt of rent*.

*Per Curiam.* There is no case which goes the length of saying that none are to be considered as landlords within the meaning of this rule, but those who actually *receive rents*. Some *dicta* look that way, but it is the privity of interest, and not the receiving of rent, which is the true test. A mortgagee out of possession may be let in to defend. Strangers only are to be excluded.

*Vide 3 Burr. 1292 to 1304.  
Comb. 209.  
Ruttington on Ejectment, 72. Buller, 95.*

Motion granted.

*Berry, who is impleaded with Bushbee, ads. Elles and others, Assignees of the Sheriff of New-York.*

MOTION by *Boyd*, to stay proceedings on bail-bond. It appeared that the *capias* in the original suit had been returned in *January* term last, and that a declaration was filed the 14th of *June* following; no

bail to the action then being put in. Process issued <sup>July Term,</sup>  
on the bail-bond in the last vacation, and on the 10th <sup>1798.</sup>  
of *August*, the defendant was arrested thereon. It  
also appeared that the notice of this motion was ac-  
companied by an offer of good bail and a *cognovit*  
*actionem*.

*Colden* opposed the motion, on the ground that the  
plaintiffs had now lost a trial in the original action for  
want of bail.

*Per Curiam.* The plaintiffs may have lost a trial,  
but they have been negligent on their part. They  
should have put the bail-bond in suit in *January* va-  
cation. It is not a loss of trial alone, which will pre-  
vent our interfering to relieve in these cases, but that  
loss must be without neglect on the part of the plain-  
tiff, and must be occasioned by the delay of the defen-  
dant, *after bail is called for*. If a different practice  
was allowed, a plaintiff would be tempted to wait a  
term or longer, and thus ensnare the bail. The  
court will always stay proceedings, if application be  
made for that purpose, *on the return of the bail-bond*  
*writ*.

Let the proceedings be stayed on payment of  
costs.

*Bird, Savage and Bird ads. Robert Murray and  
Company.*

HARRISON presented a petition from the defend-  
ants to remove the cause into the federal court, on  
affidavit that the defendants are aliens.

July Term,  
1798.

It appeared that special bail had been put in last December, but an exception was entered, and bail had not been perfected till this term, and till after the petition had been filed.

*Pendleton* and *B. Livingston* objected, insisting that the defendants were too late; their appearance having been entered in *January* last, and the act of Congress, under which the application is made, directs that the petition be filed *when the appearance is entered*.

*Per Curiam.* The defendants are in season. As the plaintiffs excepted to the bail, they shall not be allowed now to say the defendants appeared before.

Motion granted.

*Suydam v. M<sup>c</sup>Coon.*

*Ejectment.*

IN this cause the plaintiff, who claimed under a sheriff's sale, had been nonsuited on the trial, for a variance between the record produced in evidence, and the writ of *venditioni exponas*, and at *January* term, 1797, had procured the nonsuit to be set aside on the payment of costs, and had moved for and obtained leave to amend the writ, by striking out the words *twenty-eighth*, and inserting the word *twentieth*.

Having been nonsuited a second time for a like variance between the record and the same writ,

*Evertson* now moved for leave to amend again, by striking out the words "*last past*," and inserting the figures 1790, and cited *Sir T. Jones*, 41.

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C. I. Bogert objected that it was now too late.

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1798.

*Per Curiam.* These errors are to be considered as the misprision of the clerk. On the authority of *Jones*, and of the former decision in this court,

Let the amendment be made.

*Child v. Murray, manucaptor.*

IN *sci. fa.* on recognizance of bail and inquest thereon, the jury assessed interest from the docketing of the original judgment, to the return of the *postea*.

To show that this was the just method of computing interest, the following authorities were cited :—  
2 *Durn. & East*, 57. 10. *Mod. Rep.* 278. notes.  
8 *Id.* 386. 358.

*Per Curiam.* The plaintiff is entitled to have interest calculated against the bail, from the day they become fixed. By this the court mean, after the expiration of the time allowed *ex gratia* to surrender, that is, eight days after *capias* returned.

— • —  
JANUARY TERM, 1799.

*Cannon, manucaptor, ads. Cathcart.*

THE principal being confined in the county of *Herkimer* on a charge of felony, application was made for a *committitur* to one of the judges of that county in *April* vacation, 1798, and before the return

## CASES OF PRACTICE.

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1799.

of the *capias* against the bail, which was refused. In *September* following, the principal was convicted, and sentenced to be imprisoned at hard labor in the state-prison for life.

On these facts a rule was taken to show cause why an *exoneretur* should not be entered.

*Per Curiam.* It appears that the defendant made a *bona fide* attempt to surrender the principal before the *capias* was returnable, and was frustrated. The principal was afterwards imprisoned for life, and even if the surrender had been effected, it could not have benefited the plaintiff.

Let the defendant take the effect of his motion on payment of costs.

*M'Nealy ads. Morrison.*

SLEIGHT, the plaintiff's attorney, received a notice of retainer from *Smith*, in *July*; in *September* following he received a like notice from *Bowman*, and twice seemed to recognize *him* as the attorney in the suit, though he never served him with any declaration, but served it on *Smith*, and entered a default for want of a plea, which *Bowman* now moved to set aside on the above statement of facts.

*Per Curiam.* It was certainly incumbent on *Sleight* to have told *Bowman*, when he received his (*Bowman's*) notice of retainer, that he had received a similar notice from *Smith*.

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Let the default be set aside ; the costs to abide the Jan. Term,  
1799. event of the suit.

*Holcomb and another, Defendants in Error, ads. Hamilton.*

AFTER imparlance, but before judgment, *I. S.* one of the defendants died ; judgment was then entered against *both* and execution issued against the *survivor*, without any suggestion on the record of the death of the other defendant ; and on error *coram vo-bis*, a rule had been taken to show cause why the record should not be amended by suggesting the death of *I. S.*

*Whiting* showed for cause, that the application was too late, the proceedings having ceased to be on paper ; *2 Viner's Abridg. title Amendment, letter H. pl. 17. Idem, page 313. letter G. pl. 2.*

*Woods*, in support of the rule, read the act of this state, which authorises the suggestion of the death of one defendant when the cause of action survives, and in answer to the objection in point of time, he cited *5 Durn. & East, 577.*

*Per Curiam.* The case cited from *Durnford & East* is in point. Courts have of late, so long as the record is before them, adopted the practice of granting all amendments to which the party would have been entitled as of course, provided that it be of no prejudice to the other party.

Jan. Term,  
1799.

Let the rule be made absolute on payment of the costs of this motion and of the writ of error.

*Church ads. Clason and Stanley.*

HERE were 18 separate causes on one policy. In July term last, on the refusal of the plaintiffs to enter into the consolidation rule, the court granted imparlances in all the causes but one, and the like in October term, and now *Boyd* for the defendant makes application for further imparlances.

*Riggs* objected. He produced an agreement which had been tendered by the plaintiffs to the defendant, and was refused. This he contended would, if accepted, have answered the same purpose as an exact compliance with the rule, and ought to have been received; and that the defendants, after refusing that offer, were not entitled to take the effect of the present application.

*Per Curiam.* The *English consolidation rule* is the one the court mean to insist on, and they will not permit the plaintiffs to prescribe to them any other.

Let the defendant take the effect of his motion.

The plaintiffs then applied for a rule to examine witnesses, *de bene esse*, in the one cause which stood open for trial; but the court refused it, observing, that they were entitled to no indulgence, till they had first acceded to the terms already required.

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*Card ads. Fitzroy and others.*

Jan. Term,  
1799.

MORTON moved for judgment as in cases of non-suit, for not proceeding to trial, on the usual affidavit; but no copy had been served on the opposite party.

*Per Curiam.* It is a rule of practice without exception, that whenever a special motion is to be made founded on affidavit, a copy of such affidavit must be regularly served on the opposite party.

The defendant takes nothing by his motion.

*Gillet ads. Wilde.*

Motion for like judgment for like cause.

PER CURIAM. A defendant is not entitled to this judgment for the first default, provided the plaintiff will stipulate to bring the cause to trial at the succeeding circuit: but if the plaintiff can sufficiently account for the default, he will not be required even to stipulate. And in all cases the defendant must make this motion the next term after the default, or he will be deemed to have waived his claim to the stipulation.

*Herring v. Tylee.*

ATTACHMENT against the sheriff. He had answered the interrogatories, and it was now moved to amend them, the amendment not being as to any

## CASES OF PRACTICE

Jan. Term, 1799. *new matter, but only thereby to obtain a more full answer to the matters already contained in them.*  
*Motion allowed.*

B.

*Williams ads. Bates.*

PROCEEDINGS under the act of the 13th *Feb.* 1789, for the relief of debtors with respect to the imprisonment of their persons.

The notice of the petition had been served on the *attorney* in the suit, the plaintiff, the *creditor*, residing *out of the state*. The service held sufficient. B.

*Mabbit and others ads. Bird, Assignee of the Sheriff of Rensselaer.*

THE original suit was instituted against *five*; the sheriff returned *four*, *taken*, and as to one, *non est*; but by mistake took bail bond for the appearance of *all*. The four who were taken entered special bail, and gave notice, to which there was no exception.

The plaintiff then instituted the present suit on the bail bond against the whole. And now,

*Woodworth* for the defendants, moved to set aside the proceedings in the suit for irregularity.

*Bird*, contra. He insisted that this court have no cognizance of a case like the present; that this is an appeal to the *equity powers* of the court, which can

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never be exercised till after forfeiture of the condition. Jan. Term,  
The defendants must resort to their plea. 1799.

*Per Curiam.* The principle contended for, by the counsel for the plaintiff, is correct. Equity powers only arise *after* forfeiture of a condition in the bail bond.

The defendants must rely upon their plea of *comperuit ad diem*. But this decision is not to be understood as precluding defendants from applying hereafter to the equitable interposition of the court.

Motion denied.

*Phelps v. Ball.*

In this cause a motion was made by the attorney general, to amend the *fi. fa.* after it was returned *satisfied*, by altering two mistakes in the writ. He cited Sir T. Jones, 41.

Motion granted.

—  
APRIL TERM, 1799.  
—

*Fleming, Executor, v. Tiler.*

THE plaintiff shows as cause against a rule why he should not pay costs, he having been nonsuited on the trial at the circuit, that the *writing* on which the suit was brought was dated in *seventy*, &c. and

## CASES OF PRACTICE

April Term, through mistake in copying, the date in the declaration,  
1799. was entered on the *nisi prius* roll, *ninety*, &c. and that for this variance the defendant had obtained the nonsuit against him.

Rule discharged.  
B.

*White ads. Spencer.*

THE plaintiff had recovered, but not *above 20l.* and now a motion by the defendant to set off his costs against the sum recovered, which was opposed on behalf of the attorney for the plaintiff, whose affidavit was read, stating that the whole of the costs was still due to him, and that the plaintiff had become insolvent.

Rule nevertheless granted to the defendant.

B.

*Phelps ads. Stafford.*

THE attorney for the plaintiff had entered the default, the last *July* vacation, before the rule for pleading had expired, and the default being entered, he had refused to accept a plea from the attorney for the defendant; who, having shortly thereafter discovered that the default had been prematurely entered, gave a notice of a motion, as of the ensuing *October* term, to set it aside, and, no counsel appearing to oppose the motion on the part of the plaintiff, it was granted *of course.*

The attorney for the plaintiff, when the notice was served, resided in *Albany*, but happening at the time to be out of town, and his office shut up, and he having, not long before, expressed an intention that he probably should remove into the country, the attorney for the defendant had supposed he had removed, and not finding he had appointed an agent, the notice had been stuck up in the clerk's office. The judgment had since been entered, and execution taken out against the defendant, and process issued against the bail.

*Ordered*, That the whole of the proceedings, from entering the default inclusive, be set aside, and the costs to abide the event of the suit.

B.

*The People v. Townsend.*

THE defendant was convicted under the statute, at the last court of oyer and terminer in *Dutchess*, of perjury, and absconded before judgment. Afterwards he voluntarily surrendered himself, but judgment was not pronounced.

LEWIS, J. who presided at the trial, now reports to the court that the verdict was against evidence, and that it was given on grounds not pertinent.

*Per Curiam.* There must be a new trial : and the judge who may preside at the next oyer and terminer in *Dutchess*, will communicate this opinion to

April Term, 1799. the judges of that court. In the mean time, the defendant must give bail for his appearance.

The proceedings which have been brought up by *certiorari*, not having been actually received, must be returned. If they had been *filed* here, they could not be sent back to the oyer and terminer; no form of process for such purpose is to be found in the books; but the court must have proceeded to try the defendant at bar, by a jury returned from *Dutchess*, or have sent the cause down to the next circuit to be held there. The court incline to the opinion, that in a capital case it would be otherwise, and that no such case could be sent down for trial.

*Vide Ludlow  
ads. The People, ante, p.  
34.*

BENSON, J. suggested, that a *certiorari* for bringing up the proceedings in like cases, ought only to be allowed in open court.

*Concklin v. Hart.*

ON affidavit that witnesses were so aged and infirm that they could not personally appear in court, it was moved that their depositions be taken, *de bene esse*, before one of the commissioners for taking affidavits; which was objected to, because the cause was not at issue, and because there was no precedent for such an application.

*Per Curiam.* This appears to be a proper case for granting a commission, and it may be applied for at any time after a suit is instituted.

Motion granted.

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1799.

*Heyers v. Denning.*

IN this cause the plaintiff had proceeded to outlawry, when he received a notice of retainer from *S.* *S.* for the defendant, who, in his notice signed *for or on behalf* of the defendant, and said verbally, that he did not mean to appear *as attorney*. At the last term *S.* had obtained a rule that all proceedings should be set aside ; but no bail had been entered.

*Jones* for the plaintiff moved to vacate the rule which was so obtained, on the ground that the interference by *S.* was irregular.

*Per Curiam.* *S*—, appearing in the manner he did, must be considered as a mere stranger, and could not take any rule in the cause. The defendant has neither appeared in person, nor by attorney, nor entered bail ; therefore all the proceedings must be set aside. And the court, considering it as improper practice in any attorney to attempt to appear *as agent, but not as attorney*, add, that *S.* himself pay the costs.

*Cornell v. Allen and Talmadge.*

MOTION that judgment of nonsuit for not bringing on the cause to trial, be set aside.

The suit was against the defendants *jointly*, on a promissory note. *Talmadge* only was brought in, and he employed an attorney. The note was afterwards, by agreement between *Allen* and a third per-

April Term,  
1799. son, taken up, and the costs paid by that person to the plaintiff's attorney. The attorney employed by *Talmadge*, notwithstanding he was informed by the plaintiff's attorney, that the note was so taken up, and the costs paid, filed a plea, the general issue, and served a copy on the plaintiff's attorney ; and at a subsequent term, after there had been a circuit in the county, obtained the above rule for judgment of nonsuit.

Judgment set aside ; and the attorney employed by *Talmadge* ordered to pay to the plaintiff's attorney the costs of this motion.

B.

*Murray v. Smith.*

THE cause had been removed by *habeas corpus*, and the plaintiff had filed a declaration, and entered a rule to plead ; but the defendant not having put in bail, a *procedendo* issued, and the plaintiff prevailed in the court below. On a reference to the judges by both the parties, they declared that the plaintiff was not entitled to have the costs of the declaration and rule to plead in this court, taxed against the defendant; these services being useless, until the defendant has put in bail.

B.

*Le Conte v. Pendleton.*

THE declaration in this cause consisted of a single count in debt on judgment, rendered in the state of *Georgia*, to which the defendant pleaded,

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1st. *Nul tiel record*, and

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2d. *Nil debet*, with notice of speeial matter.

It was then moved that the defendant show cause why one of the pleas should not be struck out.

*Harison*, for the plaintiff, in behalf of the motion, insisted that the record of *Georgia* is, by the constitution of the *United States*, entitled to implicit faith ; and if so, the two pleas could not stand together ; or if such faith is not to be given, the plea of *nul tiel record* is a mere nullity, and ought to be struck out, and cited to this point, 1 *Douglass*, 6. 2 *Dallas*, 302. 1 *Cromp. Prac.* 173. He also contended that one plea being triable by the court, and the other by the jury, it was an additional reason why they ought not to be allowed to stand together.

The defendant contended in reply, that the issue on *nul tiel record* to judgments rendered in *other states*, can only be an issue to the *country*, and that therefore both these pleas must be tried in the same manner. He relied on the case of *Walker and another v. Willer. Douglass*, 1.

The court, without giving any opinion on the question, whether *nul tiel record* was at all pleadable in the case, granted the plaintiff the following rule, viz.

“ *Ordered*, That only one of the two pleas in this “ cause be allowed, and that the defendant, within “ four days after notice of this rule, do, or in default

## CASES OF PRACTICE

April Term,  
1799. "thereof, that the plaintiff do elect which shall be  
"allowed, and that the other plea shall be deemed  
"disallowed." Vide the case of *Carnes v. Duncan*,  
admr. *ante*, p. 41.

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## JULY TERM, 1799.

*Baker ads. Burns.*

LEE moved that the defendant be brought up  
to take the benefit of the act made "for the relief  
"of debtors with respect to the imprisonment of  
"their persons."

Munro, for the plaintiff, objected, 1st. That in the  
inventory served on him, the arms of the defendant are  
not specified in the schedule; 2d. That the inventory  
does not particularize when he owned and had the ar-  
ticles, &c. 3d. That he is confined on a suit for  
breach of promise of marriage, and that this is to be  
considered as a *tort*, whereas the act only applies to  
contracts; 4th. That the inventory is not stamped, as is  
now required by the statute of the *United States*.

*Lee, contra.*

*Per Curiam.* All the objections are untenable,  
excepting the last, but the inventory ought to be  
stamped, and that objection is fatal.

Motion denied.

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Pendleton ads. *Le Conte.*

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1799

ISSUE was joined on the 9th of *June* last, and on the 19th, notice was given by the defendant, that application would be made this term for a commission: notwithstanding which, on the 26th, the plaintiff gave notice of trial for the *July* circuit, at which time an inquest was taken by default.

*B. Livingston* now moved to set it aside for irregularity.

*Harison*, for the plaintiff. The defendant having been obliged by the order of the last term to elect one of two pleas, as seen fit to abide by the plea of *nil debet*; but no such plea can be received in this action, and it must be considered a mere nullity. The merits of any judgments rendered in another state cannot, under the act of Congress, be examined here. *Nul tiel record* is the only plea that is admissible. And as to the notice of the intended application for a commission, it ought not to operate to procure the defendant a delay, for it was his neglect that he had not applied last term.

*Burr*, in reply. Whether any testimony involving merits can be admitted under any plea, or whether the plea of *nil debet* is proper in this action, are points not to be tried in this way. The application for a commission is in time, according to Rule IX. of April, 1796.

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1799.

*Per Curiam.* Issue not having been joined till after the election was made in vacation, the defendant is in time by the Rule of *April*, 1796. On the other point, we are of opinion that the propriety of the plea is not examinable, upon this motion.

Let the verdict be set aside, and a commission issue: the costs to abide the event of the suit.

*Haskins ads. Griswold.*

BURR, for the defendant, moved for leave to withdraw his demurrer and plead issuably, on affidavit that he had merits which he did not know of till after he had filed his demurrer.

Riggs insisted that as the demurrer was frivolous and only put in to obtain delay, the defendant ought not now to be permitted to withdraw it. He then read a counter affidavit on the point of merits, showing an acknowledgment on the part of the defendant, subsequent to the commencement of the suit, of the justness of the demand, and a promise to pay it.

*Per Curiam.* It appears upon the face of the demurrer itself, that it was frivolous and for the purpose of delay. If a defendant will put in a frivolous demurrer, and then applies to the 'grace' of the court, he shall have none. He has acted unmeritoriously, and shall be held to *summum jus*.

The defendant must take nothing by his motion.

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1799.

*Swartwout, manucaptor of Sands, ads. Gelston, As-signee of the Sheriff of New-York.*

THIS was an application to stay proceedings on bail-bond. The attorney for the defendant in the original suit, had given notice of retainer and of bail at the same time, by leaving it at the *office* of the plaintiff's attorney (which was kept in his dwelling-house) when no person was present. It appeared that two terms had elapsed before the present suit was commenced.

It was insisted, 1st, that the service of notice was regular, and to this point was cited *4 Durn. & East*, 464. And 2d, that the plaintiff had been negligent in delaying so long to put the bail-bond in suit. *Barnes' Notes*, 103.

*Per Curiam.* The notice was not duly served. It should have been given to some *person* in the *house*. To make a notice good, it must be shown that every thing has been done to bring it *home to the party*. The service must, first, be on some person in the *office*, and belonging there; if nobody is there, it must be upon some one in the *house* where the attorney resides or the office is kept; and if nobody is there it may be left in the office. But as there has been a negligence on the part of the plaintiff, in not putting the bail-bond in suit at the subsequent term, we will not now fix the bail for the irregularity of the notice, which the prevalence of the yellow-fever in the city at the time, may in some measure excuse.

## CASES OF PRACTICE

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1799.

Let the proceedings stay on payment of costs, and receiving a justification of bail if required.

*Wortman*, for the defendant.

*Coleman*, for the plaintiff.

*Waters, Sheriff of Orange*, ads. *The People*.

THE sheriff was brought in, upon an attachment, and the plaintiff in the original suit having filed interrogatories within the four days allowed him, and the sheriff having also filed his answers, as taken by the clerk, the following judgment was entered :

*Per Curiam*. A sheriff is not to be considered as in contempt for not acting on an execution which never came to his *personal* knowledge, or was not lodged in his office. But in this case it appears the *fi. fa.* was delivered to a *deputy*, and we need not say whether such delivery be good, so as to charge the sheriff himself, because here the sheriff afterwards affirmed the receipt by interfering and acting. He did not return it within forty days, and his answers are not satisfactory.

The court adjudge him to pay a fine of twenty dollars for the contempt, and also the costs of the rule and attachment, and to stand committed till the fine and costs be paid.

*In the matter of M'Kinley & Co. Absent Debtors.*

MUNRO, indorsee of a bill of exchange drawn by *M'Kinley & Co.* sued out an attachment under the act passed 4th April, 1786, for relief against abscond-

ing and absent debtors, and seized *a vessel*, the property of *M'Kinley & Co.* Afterwards *Munro* received the amount of the bill from *Wheeler*, his indorser, but it was agreed between *Munro* and *Wheeler*, that the proceedings should still go on for the benefit of the latter, and *Munro* be considered as his trustee. Application was then made on behalf of *M'Kinley & Co.* to the recorder for a *supersedeas*; upon the ground that the plaintiff, after having been satisfied for his demand, could not still retain the attachment. The recorder allowed the *supersedeas*, from which there was an appeal to this court.

July Term,  
1799.

*Per Curiam.* The 22d section of the act provides, "That if any person, against whose estate or effects such warrant of attachment shall be issued, shall at any time before trustees are appointed, apply to the judge who shall have issued such warrant, and give such security as such judge shall direct and approve, to the person or persons at whose instance such warrant issued, to appear and plead to any suit or action to be brought within six months thereafter, &c. and to pay all such sums as may be adjudged in such suit or action, then such judge shall issue a *supersedeas*." And the 23d section provides, "That in all cases where, upon any such attachment or attachments, any ship or *vessel*, or any part thereof, shall be seized or attached, it shall be lawful for the judge who shall have issued such warrant or warrants to cause such ship or vessel, or part thereof, so seized or attached, to be valued by indifferent persons; and if any person will give security to be approved of by such judge, to the people of the state of New-York, for the benefit of the creditors

## CASES OF PRACTICE

July Term,  
1799. "of such debtor, to pay the amount of such valuation to the trustees to be in such case appointed, "then such judge shall cause such ship or vessel to "be discharged from such attachment."

Although a payment may be equivalent to giving the security required by the 22d section of the act, as has been insisted in the argument, yet, that certainly must be a payment by the principal debtor, and not by his surety, or one who is collaterally responsible; the applicants therefore do not come within that section. The next section provides, expressly, that the security shall be given for the benefit of *all the creditors*, and therefore, as the indorser here who paid the money must be considered as a creditor, he has a right to avail himself of this attachment, and *Munro* may be considered a trustee for his benefit.

If the prosecutor is paid, and the applicants would avail themselves of it, they must resort to their plea.

Let the order be reversed,

OCTOBER TERM, 1799.

*Cannon, manucaptor, ads. Catheart.*

IN *January* term last, the defendant, as special bail, was relieved, and an *exoneretur* was ordered to

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be entered, on payment of costs. The costs not having been paid, the proceedings went on; and now it was moved by *Burr* to have him relieved, on the ground that costs never having been demanded, nor a bill exhibited, there was no neglect on the part of the defendant in not having paid them.

*Per Curiam.* The discharge ordered at last *January* term was conditional, and it was the duty of the defendant to have paid the costs to the plaintiff, without waiting for a demand, or the tender of a bill. If he is relieved now, it must be on payment, *instanter*, of the costs ordered last *January* term, and also the costs of the subsequent proceedings, including the costs of resisting this application.

Let him take the effect of his motion on those conditions.

*Platt v. Robbins and al. Administrators, &c. of Smith.*

A JUDGMENT against *Smith* in his life-time had been revived by *scire facias* against the defendants as his administrators, on which there was a judgment by default. A suit was then brought against the present defendants, suggesting a *devastavit*, to which they pleaded,

1. *Plene administravit.*

2. That the defendants as administrators did not *cloign* the assets.

Ost. Term,  
1799.

3. That *Smith*, their intestate, executed, before his death, a bond of 50,000 dollars to the *United States*, which remains unpaid.

It was now moved, on behalf of the plaintiff in the suit, that judgment be rendered against the defendants by default, for it was insisted that as to the pleas put in, they were mere nullities.

It was said in reply, that this was not the regular method of testing the validity of pleadings, and that the plaintiff ought to have demurred.

*Per Curiam.* If pleas are not palpably bad, and void, upon the face of them, the opposite party must resort to his demurrer. All the court have doubts as to one plea, and some of them as to all: and therefore

Plaintiff must take nothing by his motion.

*Boyd*, for the plaintiff.

*Burr*, for the defendant.

*Salstonstall* ads. *White*.

Ejectment.

PROCEEDINGS in ejectment for the *Holland Company* lands, so called, in the county of *Ontario*, as for a vacant possession.

*D. A. Ogden* moved that *Wilhem Willinck* and three others, commonly called *The Holland Company*, be made defendants instead of *Salstonstall* the present defendant.

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*Troup*, on the same side. Any one, whatever, Oct. Term,  
claiming title, may be made defendant, though he \_\_\_\_\_  
has never been in actual possession; and to this  
point cited *Sty.* 368. *Sid.* 24. 1 *Lilly's Abridg.*  
574. 4 *Durn. & East*, 122. *Comb.* 13.

1799.

*E. Livingston*, contra. It is settled that in proceeding for a vacant possession, one claiming title, who is not already a party to the suit, cannot be admitted to defend, but must resort to his action of ejectment. He cited 2 *Cromp.* 191, 192. Statute of this state passed 21st Feb. 1788, sect. 29, 30. the first of which sections subjects *tenants* to penalties for not giving notice to their *landlords* of declarations in ejectment; and the last of which provides that *landlords* may be admitted defendants by being joined with their *tenants*. From which it follows, that no case is contemplated by our laws of admitting any one to come in and defend who is not a party to the original suit, except a *landlord* who has a *tenant in possession*.

*B. Livingston*, in reply. In this case the lands, in judgment of law, are not vacant. The suit is brought to recover several hundred thousand acres, and it appears by the affidavit, that the *Holland Company* have surveyed the tract, and erected buildings on some part of it.

*Per Curiam.* The strict principles applicable to proceedings as for a vacant possession in *England*, cannot, without manifest inconvenience, be applied to unlocated lands in this country. Besides, here has been a survey of this land, and buildings have been erected on some part of it.

Motion granted.

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1799.

*Brown v. Mitchell.*

*Ejectment.*

THE lessor of the plaintiff recovered at the last *Dutchess* circuit on title existing prior to 1776, and the defendant set up title derived from the state, under a sale by the commissioners of forfeitures, prior to 1782, and under the act passed *October 22d, 1799*, entitled, "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state, in respect to all property within the same."

The *Attorney General* for the defendant, now moved for the appointment of appraisers under the first section of the act passed *May 12th, 1784*, entitled, "An act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned," to ascertain what improvements the plaintiff must pay before he can take possession.

*Evertson*, contra. The act of 1784 cannot apply to sales made prior to it.

The *Attorney General* in reply, cited the 10th section of the act passed *May 1st, 1786*, entitled, "An act further to amend an act entitled, an act for the speedy sale of the confiscated and forfeited estates within this state, and for other purposes therein mentioned."

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*Per Curiam.* The act last cited is retrospective, and affects prior titles, and so courts have considered them. Oct. Term,  
1799.

Let the defendant take the effect of his motion.

*George ads. Benninger.*

THE court, in this case determined, that if a notice of argument is given for any day in term, subsequent to the first, the party who would object to it on that account, must appear and state such objection at the time when the motion is brought on; and if he does not, he will be deemed to have waived such objection.

*Drake v. Miller.*

A JUSTICE of the peace was brought up on attachment for a contempt in not having made return to a *certiorari* directed to him, and made returnable "before us."

*Per Curiam.* The act passed the 24th January, 1797, entitled, "An act concerning the Supreme court," enacts, "that all writs and process to be issued from and after the expiration of *October* term in the present year, and returnable in the supreme court, shall be made returnable before *our Justices of our supreme court of judicature.*" &c. and process made returnable in any other form must be considered as returnable out of court and void.

Let the attachment be discharged with costs.

Oct. Term,  
1799.

*Vielie ads. Towers.*

THIS was an action of assault and battery, and a verdict for the plaintiff at the circuit, for six cents damages and six cents costs. A certificate was given by the judge who presided at the trial, to entitle the plaintiffs to full costs, but it was not given *at the trial.*

*Woodworth*, for the defendant, under a motion "that the certificate of the judge be vacated," now brought up the question whether this certificate is conformable to the 5th section of the act entitled, "An act to "reduce the laws concerning costs into one statute," passed the 12th of *February*, 1787. He contended, that, agreeably to this act, the certificate must be granted by the judge *sedante curia*, and could not be granted with any effect afterwards: such he said was the *English* statute, and such their practice under it.

*Per Curiam.* The statute enacts, "that in all actions of trespass and assault and battery, commenced or prosecuted in the supreme court, wherein "the judge *at the trial* of the cause, shall not find and "certify under his hand upon the back of the record, "that an assault and battery was sufficiently proved, "or that the freehold or title of the land mentioned "in the plaintiff's declaration, was chiefly in question, "the plaintiff in such action, in case the jury shall "find the damages to be under forty shillings, shall "not recover or obtain more costs of suit than the "damages so found shall amount to." This provision, being reasonably interpreted, means only that

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the certificate should be given by the judge who pre- Oct Term  
sided at the trial, and not that the act of making out \_\_\_\_\_  
the certificate should be performed then. 1800.

—\*—  
JANUARY TERM, 1800.  
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*Dole, Sheriff of Rensselaer, v. Moulton and others.*

THIS was an action upon a bond given to the sheriff, conformably to the act passed April 5th, 1798, entitled, "An act regulating the liberties of gaols."

The defendants pleaded five pleas;

1. *Non est factum.*
2. Performance of the condition.
3. That the escape was by casualty, and that there was a return before suit brought.
4. That the penalty is for more than double the amount of the sum for which the prisoner was confined, and so not agreeable to the statute.
5. That the condition of the bond is not conformable to the statute.

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1800.

But the two last pleas were added after demurrer to the second and third pleas, and before default or joinder.

*Henry* for the plaintiff withdrew his demurrer, and now moved that the defendant elect one of the three first pleas and abide by it, for he insisted that the pleas were incompatible. And he moved, at the same time, that the two last pleas be struck out for irregularity,

*Woodworth*, contra. He contended that pleas have been allowed to stand together, though seemingly incompatible; and cited *2 Blackst. Reports*, 1093.—And in answer to the last motion he insisted that it was regular to file the two last pleas at the time he did, under the provision contained in the 8th section of the rules of *April* term, 1796,

*Per Curiam.* The rule referred to by the defendant's counsel, that "where there shall be a demurrer to a declaration, or to any other pleading, not being a plea in abatement, the party against whom the demurrer shall be taken, may, at any time before the default for not joining in demurrer shall be entered, amend the pleading demurred to," will never extend to permit the party to add new pleas: those pleas must therefore be struck out.

As to the first motion, the plaintiff, after demurrer, comes too late to drive the defendant to an election.

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Let the plaintiff take only the effect of his motion Jan. Term,  
1800. in respect to the two last pleas.

*Vanderwerker ads. Cuyler.*

JUDGMENT, as in case of nonsuit, had been entered in a former cause, for not proceeding to trial, and it was now moved by

*Emott*, after plea put in, and notice of trial received, that all proceedings should stay till the plaintiff should pay the costs of the first suit. He cited 2 *Durn. & East*, 511.

*Woodworth*, contra. Suits are not to be stayed till former costs are paid, except in ejectment, or where the merits have been tried, or if the suit appears to be vexatious. It has, however, been done in trespass *de bonis asportatis*, and in case of a malicious prosecution. Besides, the defendant, after the plea pleaded, comes too late. He cited in support of his first position, 2 *Blackst. Reports*, 741. 3 *Wilson*, 149. 2 *Burr.* 1026.

*Per Curiam.* The second suit shall be intended to be vexatious, the plaintiffs having voluntarily suffered a nonsuit in the first. The defendant at no time is too late to make this application pending the suit and before trial.

Motion granted.

Jan. Term,  
1800.

*Shepherd ads. Case.*

THIS was a motion for a new trial; but it was opposed on the ground that judgment having been entered, and no order obtained from a judge to stay proceedings, according to the fourth rule of *January term, 1799*, the defendant was now too late.

*Per Curiam.* The true construction of the 4th rule of *January term, 1799*, is,

First. That the notice of a motion, accompanied by a judge's certificate is a substitute for the former practice of a *rule to show cause*, and, therefore, if the party neglects to obtain a certificate, the consequence is, that if, when the hearing is to come on, *judgment be duly entered*, he cannot be heard on the motion.— We will not hear an argument to set aside a verdict, default, or inquisition, *after judgment duly entered*.

Secondly. There is nothing in our rules to prevent a party dissatisfied with the refusal of a judge to grant a certificate, to apply to the court. The defendant is not, therefore, strictly entitled to be heard, but as there appears to have been a misconstruction of the rule, we will, in the present instance, open the cause and hear the motion.

*Spencer*, for the defendant.

*Van Vechten*, for the plaintiff.

*Sacket, demandant, v. Lothrop, tenant.*

THE sheriff, on the *quarto die post*, had not returned the writ, and the demandant obtained a rule

that he return it, *sedente curia*, or show cause why <sup>Jan. Term,</sup> 1800. an attachment should not issue ; and now, the writ \_\_\_\_\_ being returned,

*Bogardus* for the defendant, moved that the tenant be called.

*S. Thompson*, contra. He contended that the defendant, not having, on the *quarto die post*, obtained a day further, must be considered as out of court. The rule on the sheriff was a nullity, and instead of it the defendant should have taken out a second summons. He cited *1 Reeves*, 119. 121.

*Per Curiam*. The tenant, if he would put the defendant out of court, should have entered a *ne recipiatur* on the *quarto die post*; not having done so here, it must be considered a waiver. By the rule entered, that the sheriff return the writ *sedente curia*, the defendant was to be deemed *continued in court* from day to day during the term. Vide *Boothe*, 92.

So let the tenant be called.

*Forrester ads. Barret.*

THIS was an action of *replevin*, and the plaintiff having omitted to bring on the cause to trial,

*Burr*, for the defendant, now moved for judgment as in case of nonsuit. *Barnes*, 317.

*Harrison* opposed the motion, and insisted that it is never grantable in this action ; and cited *Buller*, 65. 3 *Durn. & East*, 661. 1 *Black. Rep.* 375.

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1800.

*Per Curiam.* In the action of replevin, both parties are equally actors, and either party may carry down the cause for trial; no judgment as in case of nonsuit therefore is ever given.

The defendant must take nothing by his motion.

*Holmes and another v. Lansing.*

EMOTT moved to amend the declaration after plea pleaded, which was granted, but a question now arose, whether the defendant is entitled both to an imparlance and to costs : vide *Str. 950. Dallas, 465.* where it is said he shall only have his election of one ; but in 2 *Blackst. Rep.* 785. he had both.

*Per Curiam.* There is a diversity of practice between the king's bench and common pleas ; the court will, therefore, adopt a rule of its own. As the amendment is for the benefit of the plaintiff, it is reasonable he should pay the costs of it : and it is equally reasonable that the defendant should have an opportunity to plead *de novo.*

The plaintiff, therefore, may amend upon payment of costs and giving an imparlance.

*Marklar and another ads. M<sup>r</sup> Evers.*

THIS cause was noticed for the *New-York* circuit in *June* last, but the notice was only of eight days : the defendant living more than forty miles distant, considered the notice void, and paid no regard to it. Inquest was taken, and when notice of taxation was

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given, application was made to a judge to stay proceedings; and now the question came up, whether ~~Jan. Term,  
1800.~~ this court would set aside the verdict?

*Per Curiam.* The notice, though defective, was sufficient to put the defendants upon inquiry, and they ought to have made their application at the next term.

The defendants are now too late, and must take nothing by their motion.

*Marston v. Lawrence and Dayton.*

DECLARATION indorsee *v.* indorsor. Plea in abatement, a former suit by plaintiff *v.* defendants, to which they had put in a plea in abatement that *Francis Childs* was a partner and not named, which suit was pending at the commencement of the present suit, and is so still; replication *nul tiel record*, and issue.

*Harrison* for the plaintiff stated the facts: that on the 13th of *December*, 1799, a discontinuance was entered in the first cause after receiving the plea in abatement therein; that the present suit was commenced before *October* term, and the declaration was filed *December* 28th; that the plea in abatement was received *December* 31st; that a *nil capiat per breve* in the former was filed *January* 13th, 1800; replication now at issue was filed *January* 16th.

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1800.

The principal question he stated to be, whether the discontinuance of a former suit must be entered *before* new suit commenced, or may be entered any time before replication of *nul tiel record* filed? He contended that the discontinuance being matter of right, may be entered at any time before replication. To this point he cited 1 *Crömp.* 188. *Barnes*, 257. 1 *Leon.* 105. *Impey's B. R.* 169. 1 *Sellon*, 304.

*Burr* for the defendants insisted that a plaintiff cannot *after plea* discontinue without leave.

*Harison* declared the proposition erroneous, for no leave is necessary in any case where there is no room for the court to impose terms or conditions on the defendant. And such is the case here.

*April term, 1800.* *Lewis* and *Kent*, J. considered the *nil capiat per breve* when entered, to have had *relation* back to 13th of *December*, when the discontinuance was entered, and therefore was done before plea pleaded, and so within the cases in 1 *Ld. Raymond*, 274. and 2 *id.* 1014. The other judges thought this not material, if the same was entered before replication, relying upon the case cited from *Barnes*. All agreed that discontinuance might be entered any time before plea pleaded in the second suit, and without leave or costs. *Barnes*, 257. *Sellon*, 304. *Impey's B. R.* 169. 1 *Leon.* 105. That defendant ought to verify his whole plea, *vide Com. Dig. tit. Abatement*, *J.* 11. That a plea in abatement triable *by record*, requires only a judgment of *respondeas ouster*, which

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is the case if tried by certificate or inspection, *vide* Jan. Term,  
Com. Dig. ante, I. 14.

*Per tot Cur.* Judgment of *respondeas ouster.*

*Phelps ads. Ferris.*

MOTION to set aside judgment entered on bail-bond, because the plaintiff had omitted to enter an exception to the bail, and it was now contended that he had by such negligence precluded himself from suing on the bail-bond.

Motion granted.

— \* —  
APRIL TERM, 1800.  
— \* —

*Britt and another v. Van Orden.*

IN this case a letter was sent by *A. B.* the defendant's attorney, in the month of *November* last, informing the plaintiff's attorney, that special bail was then filed; the plaintiff relying upon this information, and not intending to object to the sufficiency of the bail, proceeded to enter his judgment in *January* term last; but had discovered since, that bail was not entered till the 29th of *January*; it further appeared that the defendant's attorney had acknowledged in his letter, that he was only employed to delay.

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*Hopkins*, for the plaintiff, now moves that the bail-piece, filed in *January*, be considered as filed on the first day of the preceding *November*.

*Woods*, contra.

*Per Curiam.* This was an irregularity in practice not to be countenanced. Let the plaintiff take the effect of his motion, with costs to be paid by the defendant's attorney himself.

*Burr v. Skinner.*

**BOYD**, for the plaintiff, moves for costs, because the defendant put off the trial at the circuit on affidavit and notice of a motion to be made at the succeeding term for a commission, the issue having been joined during the vacation.

*Pendleton*, contra.

*Per Curiam.* When a defendant, in such case, wishes to sue out a commission, he must give notice of it, before he receives notice of trial, or within a reasonable time, according to circumstances, and such notice shall stay proceedings: but, if it is after notice of trial, he must pay costs to that time. Here the defendant was negligent in waiting till he had first received notice of trial, and he must, therefore, pay costs.

Motion granted.

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*Hausenfrats ads. Graves.*

MOTION on the part of the defendant, to set aside a default on affidavit, stating that the declaration was filed the 28th of *January*, and served by being put up in the clerk's office; that the default was entered on the 19th of *February*, at the expiration of the twenty-day rule, no attorney having been then employed.

It was now contended, that as no attorney was employed by the defendant, the declaration should have been put up in the office forty days before default entered, according to the 8th rule of *January* term, 1799.

*Per Curiam.* The rule cited only applies to a case where an attorney is employed for the defendant, but neither lives in town nor has an agent there.

The defendant must take nothing by his motion.

*Loder ads. Scofield and Wife.*

MUNRO stated that the tenant had, at a previous term, demanded view, but that the demandant had not issued the writ, and now he renewed his motion, that the defendant sue out the writ of view, and cause view to be given by the first day of next term, or be nonsuited: and cited *Booth*, 40. to show, that though a view be granted at the instance of the tenant, the defendant is bound to sue it out.

Writ of  
right.

Rule granted.

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*Earl v. Lefferts.*

A QUESTION arose in this cause on the consolidation rule, whether on judgment being rendered in one cause, the plaintiff was entitled to judgment in the other causes *immediately*?

*Per Curiam.* The other defendants shall have eight days to pay the money, after judgment in the cause tried and taxation of the costs in all the causes. The plaintiff, however, may proceed immediately to perfect his judgment, for his better security; but if the defendants will pay within the eight days, it shall exempt them from the costs of entering up such judgments. When a judgment of this kind is rendered in *Albany*, and the defendants live in *New-York*, and so vice versa, then, instead of eight they shall have fourteen days: but if payment is not made within the time allowed, or if the plaintiff does not elect to enter his judgment till the expiration of the time, he may then enter his judgment *nunc pro tunc*, and have his full costs.

*Durell ads. Stansbury, Assignee of the Sheriff of West-Chester.*

*Delavan ads. The same.*

RULES had been obtained at last *October* term to stay proceedings on bail-bond suits, the opposite party not having appeared to object. At last *January*

term an application was made to set those rules aside, <sup>April Term,  
1798.</sup> on the ground that no regular notice of them had been served. Other objections were added as to the regularity of the application at *October*, to stay proceedings, particularly, that one of the plaintiffs had not been truly named in the bail-pieces ; and that the bail, in the original suit, had not justified.

A variety of affidavits taken on both sides were then read to the point of merits. And it appeared that the special bail and the defendants to the bail-bond suits were the same.

The court *ordered*, “That these causes being now “opened, and in the same situation in which they “were the beginning of last term, let the proceedings “on the bail-bonds stay, on payment of costs ; on “bail’s justifying, if required : and on the terms offered by the defendant’s counsel, viz. to correct the “name in the bail-pieces and confess judgment in the “original suit.”

The defendant’s attorney not understanding that the rule went so far, but that it merely extended to the vacating the first rule, applied to a judge at his chambers on the 5th of *February*, and obtained an order staying proceedings generally until the next term. This order was then duly served on the plaintiff’s attorney, but, considering it irregularly obtained, he took no notice of it, but went on with the suits. And now

*Riggs*, for the defendants, moved to set aside all proceedings since last term, as being contrary to

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1800. the judge's order ; and for a rule to stay all proceedings upon the bail-bonds, on the terms formerly offered.

*Jones* objects, 1. Because the judge's order was irregularly served, as it was not preceded by or accompanied with any notice of motion, and because, after the order made at term, it was irregular to apply to a judge at his chambers. 2. Because there had been no offer by the defendants to justify, or to give the *cognovit actionem* till the 2d of *April*, although the plaintiff had filed his declaration on the bail-bonds as early as the 7th of *March*. 3. Because the costs had never been paid or tendered.

*Riggs*, in reply, said, first, that the defendants had never understood that the order of the court at *January* term extended to any thing further, than merely to vacate the order obtained at *October*. As to the second objection, that the bail had not justified, that, upon principle, could not be requisite, as the bail to the sheriff had become bail above, and the plaintiff, by suing the bail-bond, had admitted their sufficiency. And as to the costs, no bill had ever been made out, nor had they ever been demanded.

*Per Curiam.* As all proceedings had been stayed in term, on certain conditions, those conditions should have been first complied with, to entitle the party to any benefit under the rule ; and it was certainly irregular to apply afterwards to a judge at his chambers for any further order. But as the defendants appear to have mistaken the former decision, the court will now stay proceedings on the same condit-

tions as were annexed last term, and on payment of April Term  
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all subsequent costs.

As to the other objection, the court observed, that it was the duty of the defendants to have sought the plaintiff and tendered the costs.

*Ditz ads. Butler and others.*

THE Attorney General, on affidavit that *Butler*, *Ejectment*, one of the lessors of the plaintiff, is dead, and was so when the suit was instituted, now moves, previous to joining in the consent rule, to have the first and second count, in which he is averred to be the lessor, struck out of the declaration.

*Riggs*, contra. It does not appear certainly that this *Butler*, who is alleged to be dead, and the lessor of the plaintiff, are the same person; but were it so, yet he may have been competent to demise before his death.

*Harison*, in reply. If the plaintiff will not produce his lessor, or give some account of him, the court ought to lay their hands on the cause. The lessor being dead, no one is answerable for costs. Besides, this is a mode of trying a title against a man's will, or trying the title of a dead man.

*Per Curiam.* Here is evidence sufficient to cast the burden of proof upon the plaintiff to show that his lessor is alive, and as he has not done so, we are all of opinion the demises by *Butler* be struck out. We are further of opinion, that this is the proper time and manner of making the application.

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*Sable v. Hitchcock.*

THE defendant here demurred to the plaintiff's declaration, and both parties having made up the paper books, the question now arose, whose right or duty it was to have done it.

*Per Curiam.* It belongs to the plaintiff to make up the books and bring on the argument in such cases. So is the *English* practice, and so has been that of this court.

*Gourley v. Shoemakers.*

ON motion to change the venue on the usual affidavit.

The court said it was not to be considered as sufficient cause for granting such motion, merely, that material witnesses reside in the county to which the party wishes to remove the cause ; but it must be added that evidence will there be given of some material fact which actually happened there.

*Crygiers v. Long.*

IN this case a verdict was entered for the plaintiff, subject to the opinion of the court on the following facts :

On the 20th of *August*, 1799, the defendant was arrested by virtue of a *capias* tested of *July* term, and returnable at *October* ; but the note on which the

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writ issued did not fall due until the 21st, and was not payable till the 24th of *August*. April Term,  
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*Hawes*, for the defendant, contended that the arrest being made before the note became due, although on process returnable after, was void. He cited *2 Burr. 962. 1 Wils. 147.*

*Evertson* insisted, that nothing could be considered as the commencement of a suit, but the filing of the bill: and that if the plaintiff shows a cause of action before exhibiting the bill, it is sufficient. He relied upon *Cowp. 454. 7 Durn. & East, 4.*

*Per Curiam.* If an arrest be made before the debt is due, the defendant should apply in the first instance to the court, or to a judge at his chambers, and not put in bail and plead. Here the defendant having omitted to make such application, and having filed bail and pleaded in chief, is too late.

*Percival v. Jones.*

THE court in this case determined, that where a point was reserved by the judge at the trial, it is to be considered as in nature of a special verdict, and the plaintiff is to prepare the case, and to open the argument.

*Sands ads. Bird and others.*

*WORTMAN*, for the defendant, moved to postpone the meeting of referees till the return of a witness from abroad, who was expected in two months,

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*Pendleton* objected, because, although the cause had been at issue for more than two years, no step had been taken by the defendant to obtain a commission; and because, although a commission had been issued by the plaintiffs the 10th of *January*, 1798, to take the testimony of the same witness, then residing in England, the defendant refused to join in it.

*Per Curiam.* The delay in the cause has been owing to the plaintiffs; nor has the defendant ever put it off. The cause is now ready to come before the referees, and this application is to be considered in the same light with the first application to put off a trial on account of absence of a material witness. It comes within the settled practice. The power given by the act to the defendant to take out a commission is in his favour, and an omission to do it cannot alter the ordinary practice.

Let the defendant have the effect of his motion to the extent of two months, unless the witness returns sooner.

*Woods ads. Dill.*

MOTION by the defendant for costs, because the plaintiff did not try the cause at the circuit after he had noticed it. It was objected to, because the failure was owing to the defendant himself, who, when the plaintiff was prepared to go on, took exception to the *jury process*, which the plaintiff himself acknowledged to be void.

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*Per Curiam.* The defect of the process was the plaintiff's mistake, and the defendant was certainly under no obligation to go to trial on it, nor had the plaintiff any right to demand it of him.

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Let the defendant take the effect of his motion.

*Bowman*, for the defendant.

*Elmendorf*, for the plaintiff.

— • —  
JULY TERM, 1800.

*Post v. Van Dine.*

WRIT returnable *April* term last; declaration filed 6th of *May*; 11th of *June* notice of bail; 13th, exception filed; on the 11th of *July* the rule for bringing in the body had expired, and the plaintiff refused to accept of additional bail unless they would justify; on the same day notice of the second bail was given, and an offer made by the defendant to deposit a sum of money to the full amount as security. Two more bail were then put in, with notice of justification on the 19th of *July*, but they now justified in open court. The defendant also swore to merits.

On the above statement of facts a motion was now made for an attachment against the sheriff. *Sellon's Practice*, 214. was cited to show that where a trial is lost, an attachment is to go and to remain as a security; vide to the same point, *4 Durn. & East*, 352.

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On the other side it was said, the case in *Sellon* was where an attachment had already issued.

*Per Curiam.* At the last circuit, there was no time to try a junior cause, so that no trial has in reality been lost. As the defendant has sworn to merits, and as money to the full amount, in lieu of bail, was tendered on the 11th of *July*, and refused, and as bail has since justified, this motion must be denied, but on payment of the costs of the rule to show cause and of the motion, by the sheriff.

*Eacker*, for the plaintiff.

*Walton*, for the defendant.

*Cole and another* ads. *Stafford*.

IN this case a plea was sent by the mail, and the attorney for the defendant swore that he believed it was received by the attorney for the plaintiff, who, notwithstanding entered judgment for want of a plea: and now

*Riker*, for the defendant, moved to set the judgment aside for irregularity.

*Wortman*, contra.

*Per Curiam.* As affidavit has been made on the part of the defendant that the plea was sent by mail, and that it is believed it was received; and as the plaintiff's attorney, after receiving a copy of this affidavit, though he makes a counter affidavit several days afterwards, does not deny the reception of the plea, the court will intend that he did receive it.

Let the judgment be set aside, and on payment of <sup>July Term,</sup>  
costs by the plaintiff's attorney himself. <sup>1800.</sup>

*Fowler*, manucaptor, ads. *Boardman and Hunt.*

MOTION to stay proceedings on the recognizance, and for leave to enter an *exoneretur* on the bail-piece. It appeared that the defendant was arrested on the recognizance on the 17th of *April*; that he fell sick on the 21st, and lay ill 10 days; that on the 26th the principal was surrendered by an agent of the defendant, he being so unwell as to be unable to do it personally.

It was objected, 1. That the surrender was not in time, being after the expiration of the eight days allowed by law; and, 2. That here the surrender was made only by an agent of the bail, and not by the bail himself, and so, not good, because bail cannot depute.

*Per Curiam.* The sickness of the defendant afforded sufficient excuse for not surrendering within the eight days. To the second objection, it appears, from the form of the sheriff's certificate, that the principal surrendered himself, and it is to be presumed it was done voluntarily. However, if it were now a question, we incline to the opinion that special bail may depute, *ex necessitate*.

Let the defendant take the effect of his motion, on payment of costs.

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*Finch ads. Kemble.*

*Ejectment.*

A CASE was submitted without argument, consisting of the following facts : A declaration was served on the tenant in possession, who, shortly afterwards, quitted, and another came in ; then some person, acting as the agent of the plaintiff, caused a second declaration to be served upon the new tenant ; this being done without the knowledge of the plaintiff's attorney, he proceeded under the first declaration, and took judgment against the casual ejector ; and now

*Gephart*, for the second tenant, moved to set aside the judgment and all subsequent proceedings.

*Per Curiam.* By the service of a new declaration by plaintiff's agent, though without knowledge of his attorney, the first declaration and service was waived. The plaintiff may at any time stay or waive his own proceedings, and his acts shall bind him.

Let the proceedings in the first suit be set aside, and the lessor of the plaintiff pay the costs of this application.

*Byron and another ads. Lefferts.*

THE declaration, with oyer, was served on the defendant's attorney, and afterwards, having been discovered to be incorrect, was amended and served *de novo*, without a new oyer, the one delivered being correct : the defendant's attorney refused to receive this declaration, without a new oyer, on which the plaintiff proceeded and entered a default ; and now

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*T. L. Ogden*, for the defendant, moved to set the default aside. July Term,  
1800.

*Hopkins*, contra.

*Per Curiam*. The service of oyer *de novo* was altogether unnecessary. The defendant must take nothing by his motion.

*Peck* ads. *Phillips*.

RADCLIFF, for the tenant in a writ of right, *Writ of right*. moved, that the defendant, having noticed the cause for the last circuit, and having omitted to bring it on, should stipulate to try at the next circuit, or that judgment of nonsuit be entered for not having tried it at the last, and also that the defendant, in the event of his stipulating, pay costs of the last circuit and of this motion, since the continuance is matter of indulgence to him. 2 *Cromp.* *Pr.* 468, 9. 2 *Black. Rep.* 1110.

*Harrison* agreed to stipulate, but opposed the application for costs, on the ground, that no costs are recoverable by law in real actions.

*Per Curiam*. The allowance of costs in this case does not depend on any statute, but upon the rules and practice of the court, merely. It is, of course,

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discretionary. As the tenant is strictly entitled to judgment as in cases of nonsuit, and the defendant, to avoid it, applies for the benefit of another rule of court, by offering to stipulate to try his action at the next circuit, we think we ought to impose on him the terms of paying the costs already accrued, for not proceeding to trial according to his notice. We ought not to grant him a favour, by allowing him to make this stipulation, and thereby escape the consequence of his default, without requiring him to reinstate the opposite party, and place him in the condition he was, by paying costs.

Motion granted.

*In the matter of Joseph Williams, an Insolvent Debtor.*

AN application was made in behalf of the insolvent, that he be brought up to obtain his discharge under the "Act for the relief of debtors, with respect to "the imprisonment of their persons."

*Schoonhoven*, for the creditors, raised three objections : 1st. That notice was not served on one particular creditor who resides in *Massachusetts*, nor was there any affidavit that he could not be found : 2d. The sum he is charged with on execution, is not mentioned in the petition : 3d. The inventory purports, by its caption, to be an inventory of *real* and of personal estate, but no real estate is afterwards mentioned.

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*Per Curiam.* All the objections are trivial. A <sup>July Term,</sup> ~~1800.~~ person out of the state is to be considered, as to the purpose of a service under this act, as not to be found.

Assignment ordered.

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*Grove ads. Campbell, Assignee of the Sheriff.*

D. TEN BROECK moved to set aside the proceedings on the bail-bond, on the ground that the plaintiff had settled with the defendant in the original cause, before the commencement of this suit, and had directed, the attorney to stay proceedings, but who, notwithstanding, proceeded.

*Emott* produced counter affidavits, which were objected to, because the defendant had not been made acquainted with their contents, previous to their being read in court, but the objection was overruled. It appeared from them, that the original cause was commenced in *July* vacation, 1797; that in *November* an accommodation was made between the parties, and the plaintiff then directed the proceedings to be stayed on payment of costs. The costs remaining unpaid, a suit was instituted on the bail-bond in *April* vaca-

Oct. Term, 1799, and the defendant put in a plea of *non est factum* in the *October* vacation, following.

1800.

On this statement it was now contended, that the proceedings were regular, as the attorney had no other way of enforcing the payment of the costs, and that, even if it were otherwise, the defendant was too late to ask relief in this way after plea pleaded, and the subsequent delay.

*Ten Broeck*, in reply, offered counter *supplementary* affidavits, but the court would not suffer them to be read, observing that a party can never support his motion by any affidavits but those on which he originally grounds it.

The court, having taken time to advise, held that the defendant should take nothing by his motion.—They said that the attorney had no other way of compelling the payment of his costs ; and besides, that the defendant had suffered such a length of time to elapse, that they would not now relieve if there had been originally just grounds for their interference.

*Vischer and others ads. Van Alen.*

~~Ejection.~~ D. TEN BROECK moved to set aside a default entered against the *tenant*, for not pleading.

*Per Curiam.* In this case, it appears, that the consent rules were entered into, a new declaration

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delivered, but no plea filed, and thereupon judgment Oct. Term,  
entered, by default, against the *tenant*. 1800.

Although at the time of signing the rule, the plea ought to have been put in, yet the entering the default in this manner was improper. It should have been against the *casual ejector*, according to the terms of the consent rule. There can be no judgment by default against the *tenant*.

Let the defendant take the effect of his motion.

*In the matter of George Cascadier, an Insolvent Debtor.*

AN application was made in behalf of the *debtor*, that the trustees be laid under a rule to report within eight days.

*Per Curiam.* The debtor, as well as his creditors, has an interest in the account to be rendered by his trustees, and is, equally with them, entitled to demand it.

It is, therefore, ordered, that they account within eight days after service of a copy of this rule.

*Lansing, who is impleaded with Doe, ads. Gorham.*

FOOT moved to set aside the default and to be let in to defend, upon an affidavit of merits, and that

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the omission to plead was occasioned by urgent business. He stated that it was a case of bail, and, therefore, is to be considered as one which comes recommended to the grace of the court.

*Lush*, contra, and read counter affidavits as to merits.

*Per Curiam.* If a party wants more time to plead, he must apply to a judge at his chambers to enlarge the rule. This is stated to be an application in favour of bail, but it should be remembered that the cases of bail to which the court are particularly indulgent, are, where bail wants time to surrender the principal, but here he comes to defend the suit, and, therefore, stands in the same situation with any other defendant.

Motion denied.

*The People, at the relation of Jansen and others, admrs.  
of Jansen, v. The Judges of Ulster.*

GARDINIER moved for a *mandamus* to the judges of the common pleas of the county of *Ulster*, to compel them to give costs for the plaintiff, a recovery having been had before them for the plaintiff, for a sum less than £. 10.

It was now contended, that, as it had been settled that executors or administrators cannot sue in a justice's court, it must follow that they shall have costs

in the court to which they are compelled to resort, and therefore that the only question now left to be considered, was, whether a *mandamus* was the proper remedy in this case, or whether it should be *error*, as the court seemed to intimate at last term.

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Error it was said would only lie to *reverse* a judgment, and not to compel the rendition of a judgment. He cited to this point, 3 *Bac. Abr.* 535. 1 *Str.* 698. *Cowp.* 378. That this was a proper case for a *mandamus*, he cited 1 *Burr.* 568. 3 *Black. Com.* 110. 1 *Str.* 530. and 11 *Co. Medcalf's* case.

*Cur. ad. vult.*

*Per Curiam.* After looking over all the authorities, we are of opinion, that a writ of error will well lie here, and therefore refuse this application for a *mandamus*.

Motion denied.

*Van Patten v. Onderkirk.*

ON Certiorari. *Emott*, in behalf of the justice, moved to quash the writ, because it required him, among other things, to *return the testimony*. It was admitted that no notice had been given the opposite party, but it was contended that none was necessary.

*Per Curiam.* This writ is the right of the party who takes it out, and the justice is bound to obey it,

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at his peril. He is not, however, bound to return anything but what we can *legally* require of him, notwithstanding the command expressed in the writ. In this case he ought to return all but the testimony, and to take no notice of that part of the precept which enjoins him to return that.

Motion denied.

*Gillespie ads. Pfister and M'Comb.*

PENDLETON moved that the plaintiffs file security for costs before they be allowed to proceed in the suit, on affidavit that one of the plaintiffs had removed to *New-Jersey* since the commencement of the suit, and that the other was confined in gaol for debt ; and further, that the defendant was informed, and believed, that the cause of action was assigned.

He insisted that the insolvency of a plaintiff was the same thing as it respected the defendant's remedy for his costs, as living without the reach of the process of the court ; and that the assignment leaving him only the trustee for the benefit of a stranger, it was reasonable that security should be filed.

*B. Livingston, contra.*

*Per Curiam.* It is sufficient that one of the defendants resides within the reach of the process of the

court, and we can take no notice whether he is insolvent or not. And as to the assignment, the defendant has nothing to do with it.

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Motion denied.

*Andrews v. Andrews.*

D. TEN BROECK moved for an attachment absolute against a witness, on affidavit that he was regularly summoned and money tendered him for his expenses, which he did not object to for its insufficiency, but nevertheless refused to attend. He cited 1 *Black.* 49. 2 *Str.* 1150.

*Per Curiam.* Here is a strong case of palpable contempt, and therefore the court will award an attachment in the first instance. The sum of money tendered may, or may not, have been adequate, but as the witness did not object to it at the time, it is to be considered sufficient.

*Woodward ads. Quackenbos.*

IT appeared that the plaintiff's attorney, at the time of delivering a new declaration after the consent rules were exchanged, not having received a plea, entered a rule in the cause against the *tenant*, to plead in twenty days; which not being done, he proceeded to enter a default against the *casual ejector*.

*Emott* now moved to set aside this default, for irregularity. He contended, that until the tenant had complied with all the requisites of the *consent rule*, he

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1800. could not be considered as being so in court as that he could be known as a party to the suit, and that, therefore, no rule could be taken against him.

*Quackenbos* said he had proceeded as had always been the practice, at least at Albany and in the northern part of the State.

*Per Curiam.* The entry of the default in this manner was certainly irregular. No rule could be entered against the *casual ejector* in a cause entitled against the tenant. The signing the consent rule, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts; should the tenant, therefore, neglect to file his *plea in bar*, he is to be considered as not appearing in the suit, and then default is to be entered against the *casual ejector*. But the default against the *casual ejector* is taken under the first rule at the return of the writ, and not in consequence of any new rule.

Default set aside.

*Slosson ads. Wheaton.*

D. TEN BROECK moved to change the venue, on affidavit that the cause of action arose out of the county.

*Emott* opposed the motion, on the ground that this being an action for money had and received, a general affidavit was not sufficient.

*Per Curiam.* It has already been decided, that in *assumpsit*, where the count is general, the court

will never change the venue on a general affidavit. To entitle the defendant to prevail in his motion, the affidavit must be special ; that is, it must state, that the defendant has reason to believe that special matter is intended to be given in evidence, enumerate the particulars, and declare that it arose in the county to which he would remove the cause, and not elsewhere.

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Motion denied.

*Knap, Executor, v. Mead.*

• THIS being the day assigned for the trial of the record on which this suit was brought,

*Beers* now moved to bring it on ; but it was objected for the defendant, that there ought to have been a regular notice of trial of seven days, as in other cases, which had not been given.

The court took time to consider how the practice ought to be settled.

*Per Curiam.* *The trial by record must hereafter always come on by a motion of four days, instead of the old practice of assigning a time, which the present rules render useless.*

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*Swift ad. Sacket.*

*Livingston ad. The same.*

*Writ of right.* EMOTT, for the tenant, moved on the first day of term, that the demandants be called, or that for non-appearance their defaults be entered.

And now, it being the *quarto die post*, he again moved that the defendant be called to appear and excuse his default, or that he be nonsuited. To show that this was the correct practice, he cited *7 Vin. Abr.* 436, 437, D. 9, 10.

*Scott* appeared for the demandants, and without attempting to show any sufficient excuse, read an affidavit that *Thompson* was the attorney of record for the tenant; whereas it appeared from the clerk's minutes that the motion had been made on the first day by *Emott*, in behalf of *Rodcliff*, who, he contended, was a stranger to the suit, and could take no rule in it.

*Emott* said in reply, that the motion was really made in the name of *Thompson*, but that the mistake was in the entry made by the clerk on the minutes, and must be considered as his misprision, and so could not injure the party.

*Per Curiam.* It is settled in *Carthew*, 173. *Clobery v. The Bishop of Exon*, that the tenant, in a writ of right, is only demandable on the *quarto die post*; but that the defendant is liable to be called on the

*primo die placiti*, and, for non-appearance, that his default may be entered, which, if he does not appear and excuse on the *quarto die post*, subjects him to a nonsuit. *Co. Lit.* 139 b. At common law, on every continuance or day given at or before judgment, the plaintiff or defendant might have been nonsuited, and before the stat. of 2 *Henry IV.* after verdict, if the court gave a day to be advised, at that day the plaintiff was demandable, and therefore might have been nonsuited, if he did not then appear; but that is remedied by our statute. After award to answer, however, or demurrer in law joined, the plaintiff, for not appearing, shall still be nonsuited, for he is not helped by the statute. As to the mis-entry of the name, it is to be considered as the clerk's misprision and may be amended.

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#### Judgment of nonsuit.

*Edwards* ads. *M'Kinstry*.

ON a motion to set aside a default, and that the defendant have leave to plead, on the sole ground that he has merits, and that the plaintiff has not lost a trial, the court said,

When a party swears to merits, the court will strongly incline to let him in, but he must be able to suggest some excuse for not having pleaded; such, perhaps, as accident or inadvertence. Here the defendant does not attempt to give any reason at all, and therefore he must take nothing by his motion.

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*Larroway ads. Lewis and others.*

*The same ads. Van Loon and others.*

*Ejectment.*

VAN VECHTEN moved to set aside the attachments, which, in these two cases, had been granted for costs of putting off the trials, and that there be a retaxation.

He contended that attachments are ordinarily granted on rules to show cause, and are never made absolute in the first instance, excepting in very flagrant cases; and that if the party answer he shall be discharged from the attachment; and cited 1 *Bac. Abr.* 183. B, 2 *Hawk. Plea.* Cr. 214. He further insisted, that there must be a demand made of the costs after the bill has been regularly taxed, and at the time of serving the rule to show cause, before the party can be considered as in contempt. He cited 1 *Barnes*, 120. 1 *Lilly's Abr.* 162. Besides, he insisted, that, according to 1 *Salkeld*, 83. no attachment will ever lie for the costs of putting off a trial.

C. Elmendorf, in reply, contended, that in England the attachment is always absolute in the first instance. He cited *Tidd's Pr.* 364. *Rumington on Ejectment*, 142. 1 *Sellon*, 415.

*Per Curiam.* Whenever a cause goes off on motion of the defendant upon payment of costs, the plaintiff has his election, either to wait the event of the suit, and have all his costs taxed together, or he

may make them out *instante* under the direction of Oct. Term,  
the court, (subject, however, to be reviewed on a fu-  
ture taxation, if required) and demand them imme-  
diately, and if not paid he may proceed with the trial ;  
or he may waive this privilege and resort to his at-  
tachment ; but if he does so, he must first have his  
costs regularly taxed on a proper notice, as in other  
cases, and that notice must be served on the *attorney*  
in the suit, and not on the *counsel*, as it has irregularly  
been in this instance. Had he done this, he would  
have been entitled to his attachment instantly, with-  
out a previous notice.

The notice in this case having been served on the  
counsel, and the taxation having been made the same  
day that notice was given, the taxation and all pro-  
ceedings founded on it are irregular.

As to the case mentioned from *Salkeld*, it is  
anonymous and stands alone ; we lay no weight  
upon it.

Let the attachment be set aside with costs.

*Seely v. Shattuck.*

ON certiorari. Notice of the rule for the defendant  
to join in error in eight days, or that the plaintiff  
would be heard *ex parte*, had been served in April  
vacation, 1798, and it was now moved for affirm-  
ance.

*Per Curiam.* The rule is gone ; the plaintiff  
should have applied the term after service of the rule.

**CASES OF PRACTICE.**

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1800. He cannot lie by in this manner, and revive the cause at any distant period he may choose.

He must now take nothing by his motion.

*Hornbeck ads. Low.*

**PER CURIAM.** The two days allowed by the sixth rule of *January term, 1799*, for making a case, cannot be enlarged by a judge in favour of the party making the case; but the time which may be enlarged under that rule, is that allowed for proposing amendments, and that for notifying an appearance before the judge and no other.

*Gibbs ads. Scott.*

THIS was a motion to change the venue in an action of slander, from the county of *Albany* to *Washington*; founded on the affidavit of the defendant's attorney, stating that the cause of action arose in *Washington*, and not elsewhere, &c. as the plaintiff had informed him, and he verily believed to be true.

On the part of the plaintiff this was opposed by a counter affidavit, stating that "according to his persuasion and belief, he could not have an impartial trial in the county of *Washington*, by reason of certain local prejudices."

**Per Curiam.** The first question is, whether the affidavit on the part of the defendant ought not to have been made by the defendant himself, according to the established practice? As the attorney swears,

however, that the *plaintiff confessed to him* that the cause of action arose in *Washington*, and not elsewhere, &c. this may be deemed sufficient; especially as the fact is not denied by the plaintiff. As to the counter affidavit, it cannot avail to retain the venue, inasmuch as the defendant only swears to "his persuasion and belief that he cannot have a fair trial, " by reason of certain local prejudices," &c. He ought to have stated the reasons and ground of his belief, and have laid before the court the facts and circumstances on which it depends, that they might judge of its probable truth and force. He merely states his own conclusions, without stating also the premises on which his belief is grounded. *Vide 3 Burr. 1330. 1335. 1 Sellon's Prac. 269.*

Motion granted.

*Hoyt and Bennett v. Campbell.*

IN error on *certiorari*. The cause was at issue in law in *July* vacation, 1799, but the plaintiff's attorney suffered *October* term to pass without having noticed it for *argument*.

The defendant's attorney then served a notice to *argue* the cause in *January* term. Neither the plaintiffs, nor their attorney, nor any counsel for them, appearing on the notice, judgment of affirmation passed against them as *of course*.

The plaintiff's attorney residing in *New-York*, and not having an agent in *Albany*, the service of the notice was by putting it up in the clerk's office there, and

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it did not, until shortly before the last term, come to his knowledge, either that the notice had been served; or that judgment of affirmance had passed, and in the meantime the plaintiffs, on being informed of the judgment, either by the defendant or his attorney, paid the costs on it, and also the demand against them arising out of the suit in the court below, before the justice.

On these facts, the plaintiffs moved in the last term to set the judgment aside, submitting two questions to the court: first, Whether the defendant was entitled to notice the cause for *argument*; and if the opinion of the court should be against them on this question; then, secondly, Whether, under the circumstances of the case, the judgment may not be set aside, in order to give them an opportunity to avail themselves *in this court*, of their causes of error if they can support them.

With respect to the first question it is to be stated; that heretofore, in all cases where there was not to be a decision by the court, until there had been previously an argument between the parties, being, except motions to set aside proceedings, the same with our present *enumerated* motions or cases, the arguments were in *writing*, and if either party delayed for a term to deliver in an argument, the opposite party took a rule against him to *argue* by the next term or be *precluded*, and on his *default* the court proceeded to examine and decide the cause on the arguments as they stood, or if there had not been any argument delivered in by the party in *default*, then on the *ex parte* argument to be thereafter prepared and deliver-

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ed in by the party who had taken the rule : as for instance, in case of a writ of error, if, after the parties were at issue in *law*, the plaintiff delayed, then the defendant would take a rule against him ; if the plaintiff had delivered in his argument, he would take a rule against the defendant to argue in *answer* ; if the defendant had delivered in his argument, he would, in this last case, take a rule against the plaintiff to argue in *reply*, and on the *default* of the respective parties, the court would, in the first case, on the *ex parte* argument of the defendant, and without any argument on the part of the plaintiff ; in the second case, on the argument delivered in by the plaintiff, and without any argument on the part of the defendant ; and in the third case, on the argument delivered in by the plaintiff, and the argument in *answer* delivered in by the defendant, and without any argument in *reply* by the plaintiff, take up the cause for examination and decision : but the practice of making decisions or *adjudications* on *ex parte* arguments or hearings being now wholly done away, and the substitute for it being, that every party is apprised that from his default to appear and *argue*, or in other words to *suggest generally* at least the *principles of his right*, he will be presumed to have *renounced* it, and so to have *consented* to what is claimed against him, and that judgment will thereupon pass for the opposite party as of *course*, the law will therefore, from the *necessity* of the thing, imply that there must be a means for a party whereby he may still have it in his power to prevent his opponent from delaying, on his part, to bring the cause before the court for their opinion, and the one which the defendant has taken in the present instance, of proceeding by a notice of a motion, in the nature of a

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1800. rule to set the cause down for argument, being equally fit and advisable with any other to be adopted or provided as a substitute for the former practice of proceeding by the rule of *preclusion*, and the plaintiffs (the party entitled in the present case to *open* or *begin*,) having delayed for a term to notice the cause for argument, it must be adjudged regular in the defendant for him then to notice it.

The plaintiffs' motion, however, as far as it rests on an irregularity in the defendant, consisting in a supposed want of right in him to notice the cause for argument, may be decided against them on this ground, namely, that notwithstanding a notice may be irregular or defective, or in any other respect improper, yet, if there has been a due service of it, the party on whom it has been served, must appear to oppose the motion, otherwise, as has been already stated, his consent to it, or a renunciation of his right to oppose it, will be presumed from his absence or silence, equally as if the notice had been perfect, and the motion proper in the case; and that it is not to be expected the court will, without the *appearance* and *suggestion* of the party, examine farther than to be satisfied there has been a competent service of the notice, comprehending as well the manner, as the time, of service. Indeed, the intent of the 7th rule of *January* term, 1799, was, that there might in future be a clear understanding on the whole of the subject to which this first question relates.

With respect to the second question, it will suffice to observe that, although there was a sufficient service of the notice, yet it did not come to the know-

lodge of the plaintiff's attorney until after the defendant had obtained the effect of it; so that there, doubtless, will have been a hardship on the plaintiffs, if the substantial justice or real merits of the case is with them, and if there is a reasonable excuse for their attorney in not having an agent in *Albany* at the time; but as these matters have not been shown to the court, they cannot interpose; the plaintiffs, therefore, are to take nothing by their motion, and to pay costs to the defendant in opposing it.

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*Palmer v. Sabin.*

THE like facts in this cause, except that it does not appear that the plaintiff has settled with the defendant for the demand in the court below, and the costs on the affirmance have not been received from the plaintiff, "he being unable to pay them; and any "other expense or trouble about the suit would be a "dead charge against the defendant;" this fact, however, not making any material difference, the same judgment therefore in this cause.

B.

*Brooks v. Patterson.*

THE defendant pleaded in abatement his privilege as an attorney of the court; the plaintiff replied, "that on the day of exhibiting the bill, and for a long time before, to wit, for the space of one whole year, the defendant had entirely ceased to practise as an attorney of this court, and had wholly abandoned the profession, business, practice and calling

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1800. "of an attorney of this court," &c. demurrer and joinder in demurrer.

The court held the replication sufficient to *oust* the defendant.

*Newkirk and Wife v. Fox.*

*Ejection.* VAN VECHTEN moved to discharge a judge's certificate staying proceedings, because the defendant had neglected to prepare his case within the two days allowed.

It was said in answer, that the reason was because the judge left the place where the circuit was held so soon after an application to him, that it was not possible to have the case completed.

*Per Curiam.* As no reason has been assigned for the subsequent omission, the defendant appears before the court without a sufficient excuse.

Motion granted.

*Sharp v. Dusenbury.*

P. W. YATES moved to set aside interlocutory judgment, because the sheriff, before whom the inquisition was taken, had admitted improper and rejected proper evidence.

*Emott*, on the other side, read an affidavit that it had been agreed between the parties, that any evidence might be given before the sheriff which could

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be given on a trial, or could have been pleaded. And he now contended, that such agreement ought to preclude either party from making objections to the conduct of the sheriff, provided no corrupt intention was to be imputed to him.

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*Per Curiam.* When parties agree to submit a controversy to the decision of the sheriff, the inquest is to be considered as in nature of an arbitration, and therefore, the court will never set aside the inquisition merely because the sheriff admits improper or rejects proper evidence.

Motion denied.

*Beebe ads. Paddock.*

A QUESTION arose as to the regularity of a service of a notice, which appeared from affidavit to have been made on the clerk of the attorney; the court decided, that as it did not also appear that the notice was served on the clerk *while he was in the office*, it was, therefore, insufficient.

*The People, at the relation of Allaire, v. The Judges of West-Chester.*

ON affidavit that a bill of exceptions had been regularly tendered to the judges of the court of common pleas of the county of *West-Chester*, who had refused to complete the same, a motion was now made for a *mandamus* to compel them to affix their seal to the bill of exceptions, or show cause.

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*Munro*, for cause, read a counter affidavit, stating, that the bill of exceptions varied materially from the truth of the case.

*Per Curiam.* If a court of common pleas refuses, without sufficient grounds, to annex their seal to a bill of exceptions, it is a contempt for which this court will award compulsory process. But it appears here, from the affidavit on the part of the defendants, that the bill of exceptions which was tendered was untrue, and, as the party making the application has not denied the correctness of the statement, he must be considered as having consented to it. This undoubtedly was sufficient cause for refusal.

Motion denied with costs to the judges for opposing it.

*Jenkins v. Kinsley.*

ON a trial by record of an action brought upon a judgment rendered in the circuit court of the *United States*, for the commonwealth of *Massachusetts*, office copies were offered in evidence.

*Williams*, for the defendant, objected that there ought either to be an exemplification of the record ; or that the action, being brought in a court of this state, upon a record of a judgment rendered in a circuit court in *Massachusetts*, the record ought, agreeably to the act of Congress, to have the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-jus-

rice, or presiding magistrate, that the attestation is in Oct. Term,  
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due form.

*Per Curiam.* This being a record of a court of the *United States*, and not of a state court, and so not within the act of Congress, prescribing the mode in which the records and judicial proceedings of the courts of any state shall be authenticated, it remains with the court to decide upon the sufficiency of the evidence in their discretion. The mode of certifying a record observed in the present instance, being the ordinary method in the commonwealth of *Massachusetts*, instead of the technical exemplification, the court are of opinion, it is sufficient.

*Wardell v. Eden.*

A BOND had been executed by *Eden* to *Wardell*, conditioned for the payment of 50,000 dollars; which, on the 17th of *July* last, was assigned for a valuable consideration to *Nathaniel Olcott*, and by him, on the 1st of *August*, to *Solomon Rowe*, and by him, on the 7th of *October*, to the *Bank of New-York*. On the 7th day of *October*, *Olcott* became a bankrupt, and on the next day *Rowe* died insolvent. The Bank immediately gave notice to *Eden* of the assignment to them, and forbid his paying any part of the bond to *Wardell*, and gave a notice likewise to *Wardell*, forbidding him to receive any thing from *Eden*. On the      day of *October*, notwithstanding the notices above, *Eden* paid *Wardell* a small sum of money, 1,500 dollars, and thereupon *Wardell* entered

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upon the record, a satisfaction of the judgment. It appeared that the bond was originally given both for money due, and to secure such further sums as *Wardell* should continue to advance.

*Hamilton* and *Harrison*, on the statement of the above facts, now moved, that the entry of satisfaction be struck out, on the two grounds of irregularity and of fraud.

*B. Livingston* raised a preliminary question, whether the service of the notice of the present motion had been regularly made, as it had only been given to *Eden's* brother, who happened to be at *Eden's* house, and it did not appear that it had ever come to his personal knowledge, or 2dly, as it had been given to *Eden's* attorney, by leaving it with his (the attorney's) brother, who happened to be alone in the office.

*Per Curiam.* Both services cannot be good; wherever there is an attorney retained, the service must be on him; therefore, the service on *Eden* himself was irregular, but the service on the attorney's brother being in his office, was good. *Lansing*, Ch. J. and *Lewis*, J. were of opinion, that the attorney in this case being constituted only an attorney to confess judgment, his authority expired with that act, and therefore, he could no longer be considered as attorney in the suit, but they both agreed that the service on *Eden* was well made.

*B. Livingston* then, before the counsel for the Bank proceeded in the argument, read counter

affidavits, contradicting some of the principal facts contained in the affidavits on the part of the application.

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The counsel for the Bank contended, that in this transaction a fraud had been practised between *Eden* and *Wardell*, on the Bank, by entering up the satisfaction after notice, which must have been done to defeat the *lien* which the judgment had given the Bank upon *Eden's* real estate. They now, therefore, appeared before the court for the purpose of getting that entry of satisfaction vacated, and strongly insisted, 1st. That the entry of satisfaction was irregular, because it was done by the party himself, and not by his attorney. They said, that although by statute a party might possibly "appear, prosecute, defend, &c. in person," yet that after he had once made an election to appear by attorney, he could not be known in the suit in person. 2d. That notwithstanding the form of pleadings was still preserved, and suits are still instituted in the names of obligees, yet that courts of law will always take notice of the rights of assignees, and protect them from injury, so that substantial justice shall be done between the parties. To show that this had been done, and to what length courts of law have gone, they cited 1 *Durn. & East*, 619. 4 *id.* 340. And to show that the court may interpose in this summary way, and lay their hands at once on the judgment, without turning the applicants round to a court of chancery, they cited *Vin. Abr. tit. Judgment*, letter *K. a.* 633, 4, 5, 6. Or if there should arise any doubts about the facts alleged, the court might, on this motion, direct an issue. 1 *Wils.* 331. *Sayer*, 253. *Barnes' Notes*, 136.

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The Attorney-General and *B. Livingston*, contra.

They said that this was a novel way of bringing up such a question, and that really neither of the parties to the suit were in court. But they insisted, 1. That it was perfectly regular for the party to enter up the satisfaction himself, and denied that it was either the province or the duty of the attorney to do it; that the very form of his warrant showed this, for being merely to prosecute and defend, the entering up satisfaction of the judgment could not be considered as being comprised within his powers. 1 *Sellon's Pract.* 14. *Sayer's Reports*, 217. 2 *H. Black.* 608. They said that by the practice of courts, warrants of attorney are in force for one year and a day, for the sole purpose of enabling the attorney to sue out execution. *Bac. Abr.* 299. that the general warrant of attorney only extends to judgment and execution, and that there ought to be a special warrant made out for the purpose of authorising an attorney to enter satisfaction, which might be made to the attorney who had conducted the suit, or to any other. Sir *Thos. Raymond*, 69. 1 *Cromp. Pract.* 378. *Sellon*, 546. *Impey*, 408. They observed, that the doctrine contended for on the other side, viz. that all acts, relating to a suit after it was instituted, must be done by the attorney, could not be true, inasmuch as it was settled law that a *retraxit* must be always entered by the party himself, and could never be done by attorney. 2 *Sellon*, 338. 3 *Salk.* 245. 8 *Mod. Rep.* 58. 3 *Black. Com.* 296.

As to the second point that courts of law will always take notice of the rights of assignees, they

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said this could only be *sub modo*, for that *chooses in action* were only assignable by way of covenant. They might, possibly, form a consideration for an *assumpsit*, and if so, the original instrument is gone, the demand becomes a personal one, and the action must be brought upon the promise; if not, then the plaintiff must always resort to a court of equity. 2 *Black. Reports*, 821. 4 *Durn. & East*, 341. 640. They insisted further, that, at any rate, this was not the proper method for the plaintiff to procure a remedy, by vacating the judgment on motion. The law in such case would oblige a party paying money after notice to pay it over again, and the demand, therefore, from the time of notice is purely a personal one. 1 *Douglas*, 238. 6 *Durn. & East*, 361. Courts of law, they said, never vacate a judgment for fraud, but only for irregularity, or in cases of legal disability, such as of an infant, feme covert, or a person under duress, where the instrument is voidable. 1 *Sellon*, 377.—At common law the remedy was by action of deceit, and if it happened subsequent to judgment, by *audi-  
ta querela*. In cases of fraud, or other controverted facts, an issue is always to be directed. *Cowp.* 727. But if this motion should succeed and an entry be made, vacating the judgment on the ground of fraud, and, afterwards, a jury, whose exclusive province it is, to judge of fact, should find the fact differently, then the record would be at variance with itself.—Here, however, it would be improper in this court, to direct an issue, for the court of chancery is the proper forum for that. Why cannot the plaintiffs proceed by *scire facias*, on the judgment in the name of *Wardell* against *Eden*, when the pleadings would afford an issue of fraud or no fraud, to be tried by a

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1800. jury? As to the notice of the assignment, so much relied on, they contended that the furthest the court could go as to notice to assignees, would be to put them on the same footing with indorsors of bills of exchange, and there it was not only necessary to give notice but to add that the indorser was looked to for payment; no such thing was pretended here. They, therefore, insisted, that the applicants had failed, both on the ground of substantial facts, and in the method taken to obtain relief. It was strenuously insisted that the remedy in such case is by resorting to a court of chancery.

*Harison* and *Hamilton*, in reply, said, this was the only way that the plaintiffs had to secure the property from being placed entirely beyond their reach, and that although a *scire facias* should be brought, as suggested on the other side, yet that they could have no security for satisfaction of their judgment in the event of their recovering one. That as to the instance of a *retraxit* which had been cited as militating with the principle they contended for, it did not apply, for the attorney is to prosecute the suit for the ends of obtaining satisfaction, but a *retraxit* is not a prosecution for such end; it is entering a bar to the suit without having received satisfaction. That it is important that attorneys should make the entry of satisfaction, as it would guard the court against fraud, for the court can always know its own officers, but cannot be supposed to know the party. They denied the position that courts of law could vacate judgments for irregularity only, and relied upon the case of the *quare impedit* cited from *Viner*, where a judgment was vacated on the ground of fraud; not, they admit-

ted, by motion, but that, they said, must depend on the extension of that form of practice, of late years.— They said that they should not dissemble, but that where the facts were disputed, there might be some doubt as to the mode; perhaps the directing of an issue might be the most advisable method, but, in the meantime, that the judgment ought to be considered as remaining unsatisfied, yet not subject to any new liens. That as to sending the plaintiffs to a court of chancery, it was objectionable, 1. Because, although a court of chancery will not interfere where the party has a remedy at law, yet the converse of the proposition is not true. 2. Because, it will be to turn a legal lien, which the plaintiffs have, into a mere equitable lien. 3. Because, if there is a remedy at law, chancery will refuse to relieve. They, therefore, prayed, that their application might be granted. *Cur. ad. vult.*

On the last day of term, BENSON, J. delivered the following order, as the opinion of a majority of the court; LANSING, CH. J. and LEWIS, J. dissenting.

“ On reading and filing the affidavit of *Martin S. Wilkins*, and the papers thereunto annexed, on the “ part of the *President, Directors and Company of the Bank of New-York*, claiming to be assignees of the “ judgment in this cause, and the affidavit of the “ said *Joseph Eden*, and the papers thereunto annexed on the part of the said *Joseph Eden*:

“ Ordered, That a *vacatur* of the entry of satisfaction of the said judgment be entered on the record;

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" and a minute thereof made in the book of dockets  
" of judgments. *Provided*, that the said *President*,  
" *Directors and Company*, shall not cause a *scire  
facias*, or any writ of execution to be sued, or a  
" suit in debt to be brought on the said judgment,  
" until they shall have farther applied to the court;  
" and it is to be understood also, that the said *Joseph  
Eden* may, at any time apply to the court that the  
" entry of satisfaction may be deemed unvacated, or  
" that satisfaction be entered anew on the said record,  
" and the court will, on such future applications of  
" the parties, respectively, take such order as shall be  
" just: and it is further *ordered*, that the clerk cause  
" a copy of this rule to be annexed to the said re-  
" cord."

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*Townsend v. New-York Insurance Company.*

MOTION for a commission to examine. This cause had been once deferred for want of testimony, to acquire which a commission had issued. The defendants afterwards, but previous to the last circuit, gave notice to the plaintiff that he should, on affidavits, (the copies of which he annexed) move for a commission to examine witnesses, and specified the

names of the commissioners. At the time of serving this notice, the defendants offered to stipulate not to delay the cause. The plaintiff did not assent to join in the commission, and in a few days gave the regular notice for trial. At the circuit, an application was made to postpone the cause; on the usual affidavit of the want of that testimony, to obtain which the commission noticed was to be sued out. The plaintiff's counsel objecting, he had till the next day to produce an affidavit of a former delay. Not doing this, the cause stood over of course:

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*Hoffman* now moved for the commission.

*Hamilton* objected to its being directed to the commissioners named.

*By the court.* The commissioners having been named in the notice of the motion; and the plaintiff having neither joined nor objected, is now concluded.

*Hamilton* then argued against the application, because it was uncertain how long it would tie up the cause, and the defendants had not entered into any stipulation.

*By the court.* It is unnecessary, for they take the commission at their peril : let it issue.

*Hamilton* hoped that it would be on paying the costs of the circuit.

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The court ordered them, and seemed to think, that in all cases of delay, costs should follow.

*Griswold and another v. Stoughton.*

ASSUMPSIT on a promissory note. The plaintiffs had proceeded under the act of the Legislature, and had entered the demand of a plea in the clerk's office, without serving it on the defendant, who lives in the city of New-York. Judgment by default having been obtained,

*Pendleton* moved to set it aside on an affidavit stating, that no rules had been entered, either for interlocutory judgment, or for the clerk to report damages on the note, offering at the same time to pay costs, and put in special bail.

*Riggs*, contra. The proceedings are regular to the default : the affidavit states no excuse for that ; and though the subsequent steps are not according to strict practice, the defendant, being in default, and that default regularly entered, is not entitled to favour. The utmost, therefore, the court will do, is to vacate the proceedings from the default.

*Per Curiam.* As the default is not accounted for by the affidavit, it is unimpeached, and therefore must stand : but as the subsequent proceedings are irregular, they must be set aside, with the usual liberty, however, for the plaintiffs to perfect their judgment this term, if they can.

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*Manhattan Company v. Herbert.*

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HOPKINS moved for a rule to bring on a trial by record.

*By the court.* Trials by record are to be brought on by notice, in the same manner as cases for argument.

*Livingston v. Delafield.*

THIS cause had been put off on the usual affidavit of absence of a witness, in expectation of whose return the plaintiff had stipulated to try peremptorily : on his not doing so, the defendant had, on a former day, moved for judgment, as in case of nonsuit, for not proceeding to trial ; but not succeeding, and the cause not having been brought on according to the second stipulation, the motion was now repeated. On the part of the plaintiff, an affidavit was read, stating that the witness was a seafaring man, and had never been within the state of New York since the suit commenced, and that the stipulation to try was in expectation of his return.

*Per Curiam.* The witness having been constantly out of the state ever since the suit was commenced, and being a seafaring man, some indulgence is due from his way of life. The defendant, therefore, can take nothing by his motion.

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*Bedle and ux. v. Willett.*

BY THE COURT. The notice of a motion to refer must contain the names of the referees. The court never nominates them. But the making the motion is not confined to the first day of term : notice may be given afterwards, on showing a reasonable cause for the omission.

*Edmund Seaman v. John Davenport and others,  
tenants in possession.*

IN partition, after service of the petition and notice, *Hopkins* moved for a rule to appear and answer. The court at first thought this a rule of course ; but on the counsel's observing, that proof of service was by the act required to be made to the satisfaction of the court, and that the manner of the service would, according to the act, vary in particular cases, the court seemed to coincide, but said that the rule must be drawn up as the party should be advised.

*John B. Church v. the United Insurance Company.*

THE plaintiff had obtained, in last *January* term, an order of court for the verdict recovered in this cause to stand, and judgment to be given accordingly, unless the defendant should, fourteen days before the next "sittings" in *New-York*, give notice to the plaintiff that a commission issued in the suit had been returned, in which case there should be a new trial, and the plaintiff at liberty to amend, &c. The clerk had drawn up the rule before the next "circuit."

The plaintiff had given immediate notice of the mistake to the defendant's attorney, and that he should be prepared to try the cause at the sittings. The defendant not having noticed the return of the commission,

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*Hamilton* moved, that the rule be amended to "sittings," and be made absolute for judgment.

Ordered accordingly.

*James Everitt, Surrogate of Orange County, ads.*

*The People of the State of New-York, ex. rel.  
Charles Beach.*

HOFFMAN moved to enter a vacatur on a rule for a peremptory *mandamus* and set aside the *mandamus* which had been issued on the following facts :

A rule was obtained in *July* term, 1802, that the defendant show cause, by *October* term, why a *mandamus* should not issue, compelling him to proceed in a cause then depending before him, concerning the will of *Thomas Beach*.

A return was made to this rule, which, from the defendant's counsel being unavoidably detained on his way to *Albany*, was not filed until the third day of *October* term.

On the first day of *October* term, *Charles Beach* attended, and obtained a rule for the *mandamus*; and

May Term, <sup>1803.</sup> on the third day, on filing the return, that rule was vacated.

Notice of the *vacatur* was given to the person who had acted in behalf of *Beach*, and obtained the first rule; but *Beach* had previously left *Albany*, and the *mandamus* issued.

At the last term Mr. *Colden* was charged with the business, to make the proper application to the court, and to oppose a peremptory *mandamus*. On Mr. *Colden's* way to *Albany*, he met Mr. *Morton*, the attorney for *Beach*, when it was agreed, that all further proceedings should be stayed until the present term. Mr. *Colden*, therefore, did not further attend to the cause.

The relator, *Beach*, attended at *Albany* at the close of the term, employed other counsel, and obtained a rule for a peremptory *mandamus*, which has been issued.

Motion granted.

*Abraham S. Hallet v. Daniel Cotton.*

THIS cause was tried at the sittings after *January* term last, when the jury found a verdict for the plaintiff for 866 dollars 20 cents. The defendant obtained a judge's order for a stay of further proceedings, until the next term, for the purpose of then moving for a new trial.

*Hawes* now moved, on the part of the plaintiff, for an order, that the defendant bring into court the

the sum found by the jury, with costs of suit; and <sup>May Term,</sup> ~~1803.~~ that in default thereof, the order to stay proceedings, be discharged. This application was founded on an affidavit stating, "That since this cause has been at issue, the special bail has been declared bankrupt and discharged under the bankrupt law of the United States. That, on the trial of this cause, a balance was admitted by the defendant's counsel to be due to the plaintiff of about 500 dollars. That, at the sittings in *November* last, on the application of the defendant, this cause was put off for that court, on the condition of payment of costs; but that those costs, although repeatedly demanded, were not yet paid." A further affirmation of the plaintiff was read, stating "That from the circumstances of the defendant, he "was in danger of losing his said debt, unless the mo- "ney was brought into court, or the rule to stay pro- "ceedings discharged; but it was acknowledged a "copy had not been served."

For the plaintiff it was said, that a motion for a new trial was an application to the equitable discretion of the court, to relieve, from what, in the opinion of the party, was an erroneous or oppressive verdict. That it was a maxim of law, founded on principles of equal justice, "that he who seeks equity, "should do equity." From the affidavit, it appeared, that the defendant had admitted, on the trial, that the plaintiff was entitled to recover about 500 dollars, which sum, entitled him also to full costs. Before, therefore, the court would suffer the defendant to be heard, on a motion for a new trial, they would require him to do, what he acknowledged to be just. The bankruptcy, and discharge of the bail,

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and the circumstances of the defendant, were additional reasons for requiring the defendant to bring the money into court, to abide the event of the suit. That, from the great number of cases now before the court, it was not in the least probable, that the case to be made in this cause, could come on in its order, and a decision be had thereon, in a shorter time than 6 or 9 months : by which time, the defendant, from his present circumstances, would, doubtless, be a bankrupt, or, as his bail were already bankrupt, he might abscond. Under such circumstances, *delay* was equally prejudicial as a *denial of justice*. It also, appeared, that the defendant was now in contempt, and liable to an attachment for non-payment of costs, incurred on putting off the trial of this cause, at a former sitting. That it was a standing rule of the mayor's court of the city of *New-York*, that, " upon every motion for a new trial, the defendant should, within eight days, bring into court, " the sum recovered by the verdict, with costs ; and " that, in default thereof, the plaintiff have leave to " proceed." That, although this court might not be disposed to go the length to establish such a rule, *in all cases*, it was believed the peculiar circumstances of this cause, were such, that they would not hesitate to make the order now requested ; or at least, for such sum as was admitted to be due, with costs.

*Bogert* said, the object of the motion was perfectly new and unprecedented.

*Per Curiam.* The practice of the mayor's court, in obliging the amount of the verdict to be brought into court on a motion for a new trial, has never been

adopted here. The insolvency of the bail,\* is certainly not a sufficient ground to induce us to make such an order; and a copy of the affirmation, respecting the defendant's circumstances, has never been served on him; of that, therefore, we can take no notice.† But, let it be understood, we do not mean to say, that had it been otherwise, we would have granted the motion.

Rule refused.

*James W. Gilbert v. James C. Brazier.*

**PER CURIAM.** The question is, whether the sheriff is entitled to fees on levying a fine. The statute directing the mode of making the levy, declares it shall be done without fee or reward. The fee-bill gives a fee; but does not say by whom it shall be paid. We all know how it has been: the fee has been charged by the sheriff, in his accounts. This, we think, is the regular practice; for it cannot be demanded from the person who has had to pay the fine.

*L. and N. Vandyck v. Van Beuren and Vosburg.*

**PER CURIAM.** Wherever a case is made, with liberty to turn it into a special verdict, execution must stay, of course, till the next term after the decision is given, that, if either party be dissatisfied, there may be time to make up the special verdict.

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\* See Gillespie ads.  
Pfister and  
McComb,  
*ante*, p. 120.

† Card ads.  
Fitzroy and  
ors. *ante*, p.  
69. See also  
Grove ads.  
Campbell,  
*ante*, p. 115.  
that supple-  
mentary affi-  
davits to re-  
but those in  
answer, can-  
not be re-  
ceived.

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*Jackson, on the demise of John Jauncey, v. Martinus Cooper and James Styles.*

THIS was an action of ejectment, in which the defendants severed in their appearances, and entered into separate consent-rules. The plaintiff, on motion, obtained leave to amend by altering the name of the lessor of the plaintiff from *John* to *William Jauncey*; but the notices on which the motion was founded were entitled as above, against both defendants.

*Benson* now moved to set aside the proceedings for irregularity, contending, that as the defendants had severed, the original suit became divided into two distinct causes. That, therefore, there should have been two separate notices, each entitled against one defendant, and served on the different attorneys of the defendants. For there was not then any suit in existence such as that in which the notices purported to be given.

*Hopkins*, for the plaintiff, insisted, the notice was perfectly regular, and likened it to the case of a suit against two, where one is outlawed, yet the proceedings are entitled against both.

*Per Curiam.* The objection taken against the notices and rules is, that as the defendants appeared by distinct attorneys, and entered into separate consent-rules, these circumstances required separate and distinct proceedings, and ought to have been entered and entitled as separate; that is, that the notices should have been separate, addressed to each party, and the

rules entered accordingly. The notice given to *Van Schaick*, attorney for *Cooper*, is entitled against two: and it is on that notice the application is made. The court are of opinion, that this is the regular way in which the notice should be entitled, though each party should be served. It does not follow, that appearing separately, and entering into separate consent-rules, justifies or requires a different practice: for pleading separately does not make separate suits. The notice must be as the cause was originally entitled, and a copy served on all the attorneys: for otherwise it would imply a distinct issue in each suit.

Motion refused with costs to the plaintiff.

*Bell and others v. Rhinelander.*

IN partition only the notice and affidavit of service is read, not the petition.

*Jackson, ex dem. Nicholas Low and others, v. James Reynolds.*

ON an affidavit stating the death of one of the lessors of the plaintiff, from belief, information, diligent search and inquiry,

*Riggs*, on the behalf of the defendant, moved to strike out of the declaration one count wholly, and in all the others the name of *Drake*.

*Howell*, contra. The application now comes too late, being after entering into the consent-rule; at all events the affidavit should state, that the fact was unknown at that time. In addition to this, he men-

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tioned, that from the counter affidavit which he held, it appeared the defendant had heretofore consented to give up possession, having failed to try according to stipulation.

*Per Curiam.* The motion must be granted. It has been before decided, that a defendant may thus come in and move, on the death of a party before the commencement of the suit. As to the objection that the application is out of season, the answer is, that it is never out of season when on the ground of an original irregularity in the plaintiff himself.\* Therefore, the not coming in earlier cannot be urged. The affidavit furnishes such evidence of the facts as are *prima facie* sufficient; and if not true, ought to have been denied by the plaintiff, especially as it is in his power: for the attorney of the lessor may, nay certainly must, know if his client is alive,

*Howell* hoped the costs wquld not be allowed.

*Per Curiam.* It does not necessarily follow that the attorney of the plaintiff must know of the death of one of the lessors. He may have examined into the title on behalf of one person acting for others equally interested, and seeing a number of names necessary to be made parties, he may think them all in existence, and the affidavit of the defendant be the first notice of the death of any one entitled. The costs ought to be paid if the fact was known sooner: and the application for the object of this motion ought to be made as soon as the right to apply was discovered. The court, however, reserved the consideration of costs till the next day, when they denied them,

\* See *Ditz ad Butler & others, ante,* p. 105.

saying the plaintiff was irregular from the beginning; and though he might not have been in fault, there is no reason for allowing him costs, when it is to have his proceedings rectified, that the defendant comes before the court.

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*Sheffield v. Watson.*

HOPKINS, for the defendant, moved for judgment as in case of nonsuit, for not going to trial.

*Woods*, contra. The cause was called on, but as there were other causes on the day calendar, one of which actually occupied the court the whole day, the plaintiff's attorney not being quite ready, thought he should be entitled to bring it on the next day, the day calendar not being gone through; but found he was put down to the bottom of the calendar for the circuit. This, therefore, is a plain mistake of the rules of practice, which ought not to injure the plaintiff.

*Hopkins*. The plaintiff clearly was not ready; therefore equally in fault, whether the rule was as he imagined, or not.

RADCLIFF, J. Acting under that belief, he did not prepare himself.

*Hopkins* hoped the plaintiff would be ordered to stipulate and pay costs.

*Per Curiam*. The excuse is certainly not sufficient to exonerate from costs. If admitted in one case, it must be in all; and however the good faith of the

May Term,  
1803. plaintiff's conduct, and our belief of it, may deny the judgment moved for, to refuse costs would do away the effect of the rule. The plaintiff must stipulate.

*Clarkson v. Gifford.*

HARRISON moved, on the usual affidavit, to change the venue.

*Evertson.* This action is founded on a specialty: in suits of this sort, the court does not change the venue.

*Harrison, in reply.* The action is on a covenant of seisin, affecting, or, as the technical phrase is, savouring of the realty.

Motion granted.

*Fallmer v. Steele and another.*

HOPKINS moved to amend a count in the declaration, in conformity to the original writ, (a certified copy of which he produced) by striking out the words "town of Herkimer," and inserting the "town of German Flatts."

Ordered.

*Maria Remsen, administratrix, v. Joshua Isaacs.*

MULLIGAN moved to set aside a report of referees for irregularity and on merits.

*Woods*, contra. In *King v. Hughes*, it was determined, that if a motion be made as non-enumerated for irregularity, the ground of merits must be abandoned, though on the merits the irregularity may be insisted on. May Term,  
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*Per Curiam*. The rule is according to the decision cited. The application must be for irregularity only to bring it on as a non-enumerated motion. If merits are united, it becomes enumerated.

*Hun and others v. Bowne.*

COLDEN for the plaintiffs, moved for leave to amend the case made by the defendant. From the affidavit of the attorney for the plaintiffs, it appeared, that the defendant's attorney had agreed to give the plaintiff's attorney till the 21st *January* last, to settle his amendments before a judge at *Albany*, the cause having been tried in *New-York*: that by some accident the amendments proposed by the plaintiffs to the case made on the part of the defendant, did not come to the hands of the counsel who was employed to attend to the business there, until the 22d *January*: and further, that the case made by the defendant, did not set forth the merits of the cause, as they appeared on the trial.

*Hoffman*, amicus. In *Duff v. Van Zandt*, on a suggestion, that the case made, did not contain a true statement of facts, the court granted a new trial after argument and decision.

*Boyd*, contra, stated some circumstances of strict and unaccommodating conduct in the plaintiff's at-

May Term, 1803. torney, which had occurred previous to the agreement mentioned in the affidavit, read by *Colden*, and some declarations of the plaintiff's attorney, that he would hold the defendant to strict practice.

*Per Curiam.* We cannot travel back farther than the agreement stated. It appears, that the defendant had given the plaintiff a time, which, from accident, he could not keep : the amendments were sent with due speed, and so, that they might have arrived at *Albany* in season, if nothing had happened to prevent it. We cannot let the plaintiff suffer by circumstances, which he could not controul. The verdict is in the hands of the plaintiff, and the defendant cannot be injured by a short delay.

*Anonymous.*

**BY THE COURT.** All causes intended for argument, must be duly noticed before term, to the clerk, that he may enter them, on the calendar. If not so noticed, they must go to the foot of the calendar, without regard to the date of their issues.

*John Halsey v. James and Samuel Watson.*

THIS was a motion for a new trial, on an affidavit of a discovery of new and material evidence. The points and substance, are so well, and accurately condensed in the decision of the court, that it is unnecessary to do more than state the judgment.

*Per Curiam.* This is a motion for a new trial, and comes before us, on the ground of a discovery of

material testimony; since the trial of the cause.— May Term,  
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To see this, and judge whether it be material or not, \_\_\_\_\_  
it will be necessary to state the former testimony and  
nature of the suit.

It is assumed by *Holsey*, the plaintiff, v. *James and Samuel Watson*, the defendants, as owners of the ship *Chesapeake*, founded on a neglect in not taking on board some tobacco, according to contract. The witness, *Heyer*, who appears to have acted as agent for the plaintiff, states what the contract was, and the time at which it was to be on board. This agreement appears to have been made on a *Friday*. The witness inquired of the defendant, *James Watson*, when the tobacco should be sent down to the vessel. The answer was, send it down as quick as possible: in consequence of which, it was sent the very next day. From three witnesses it is shown, that the principal part of the tobacco was on the dock by eleven o'clock in the forenoon, and, that the whole was ready to be put on board by three. These facts, then, are established by three witnesses. The captain swears, that, after 4 or 6 hogsheads had been brought, he requested the cartmen not to bring any more, as there were appearances of a storm. This the principal cartman has, in effect, denied; for he says, he was desired by those on board the ship, or the captain, to bear a hand; and that he got all the tobacco down by dinner time. Here the testimony is contradictory. We are to judge then, if the material evidence, as it is termed, that has been discovered since the trial, be really testimony of materiality. There is one person who swears, as to the directions given by the

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captain. The court are of opinion, that this is not material, so as to warrant granting a new trial. This, in two points of view : The testimony goes only to impeach the credit of what has been sworn, and not to establish any new fact. It is merely contradicting former evidence. In that point of view, it is not material : nor can it be so in another, unless the defendants can go further. The direction not to bring down the tobacco, was to a cartman. This is not sufficient; as *Watson* directed it to be sent as soon as possible. It ought to have been to the owner of the tobacco : or to have shown, that the request was brought home to the knowledge of the plaintiff : that it was made to a cartman, is not sufficient. The defendant's affidavit states two other witnesses who are material; but does not say to what facts they would testify ; we cannot, therefore, judge, whether they are material or not. *Blackmer*, it is stated, will testify, that the tobacco was not marked till *Monday*. This will only go to impeach the credit of the testimony ; for, three witnesses swear to the fact of the marking being before one o'clock, on *Saturday*. The captain himself, does not pretend, that the reason for not taking it on board, was the hogsheads not being marked, but only, that he had not time. He does not pretend it was not ready to be taken on board.

New trial refused.

*Francis Huguet, Assignee of the Sheriff; v. James Hallet.*

THIS was a motion in an action on a bail-bond to set aside the proceedings and execution sued out. It appeared that soon after the bail-bond was prosecuted,

the attorneys for both parties had entered into an agreement, in the nature of a rule, to stay proceedings in the bail-bond suit on the usual terms. That the defendant had accordingly filed special bail in the original suit, and had given the regular notice, but had not paid the costs of this suit, as by the terms of the rule he was bound to do. The plaintiff, on special bail being entered, went on in the original suit, and in July, one thousand eight hundred and two, obtained final judgment, on which execution was issued, and thereupon satisfaction obtained. After this the plaintiff went on with this suit, entered a default, and in January last obtained final judgment, and issued an execution, on which the sheriff, by direction of the plaintiff's attorney, levied the costs only, but still had them in his hands. The defendant in the last vacation obtained an order of his honour, *Judge Radcliff*, to stay all proceedings.

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The application now was, that the sheriff restore to the defendant so much of the money in his hands as exceeds the costs which were due on the bail-bond suit when the rule to stay proceedings was entered into.

The counsel for the defendant produced an affidavit, by which it appeared, that the attorney for the plaintiff had frequently given the attorney for the defendant verbal notice that he was proceeding with the bail-bond suit. But it did not appear that any bill of costs had been presented, or any demand of a bill of costs made on the one side, or of the costs on the other.

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*Colden*, for the defendant, contended, that special bail being filed under the rule, with an intent to stay the proceedings on the bail-bond, the plaintiff could not accept it or avail himself of it, unless it was to have that operation.

That the plaintiff could not proceed with both suits : at most he had but an option to proceed with either, but having elected to pursue the original suit, he thereby precluded himself from going on with the other.

That after the defendant had filed special bail the plaintiff might have gone on with his original suit; and the court would probably have compelled him, by attachment, to pay the costs in that on the bail-bond, up to that time.

That there was no precedent for this double proceeding, which was a strong evidence that it could not be right.

*Stuyvesant*, contra. It was the duty of the defendant to have paid the costs on the bail-bond, when he gave notice of special bail. The plaintiff had no other possible remedy for his costs than the mode he has adopted, and as the defendant's irregular conduct has compelled the plaintiff to proceed, the whole costs are due from the defendant, and are nothing more than the result of his own irregularity and obstinacy.

*Per Curiam*. This is a motion to set aside proceedings on the bail-bond on the facts stated by the affidavit. The suit was commenced in *January*,

1802, returnable in April. Afterwards, in May, the action on the bail-bond was brought. Shortly after, the plaintiff's attorney received notice of bail in the original action and then delivered a declaration. He went on to judgment, and proceeded on the bail-bond to recover costs. The plaintiff's attorney states that he called on the attorney of the defendant, and requested him to pay the costs on the bail-bond, which he did not do, though no regular bail had been put in. On this, proceedings were continued in the bail-bond suit to judgment, on which an execution has issued for the costs. The application is to set aside the proceedings and execution in the bail-bond suit. It is established, with respect to tendering costs on a rule to stay proceedings on the bail-bond, that it is the defendant's duty, when the rule is obtained, to plead and tender costs.\* There was no rule to stay proceedings : but an equivocal agreement in the place of that rule, and should receive the same construction. It was the duty of the attorney of the defendant to plead and pay costs. This would have been ordered had he not proceeded in the original suit : but when he did that, it was a waiver of his proceedings on the bail-bond, and a waiver of the right to a plea from the opposite side. The proceedings must be set aside on payment of costs up to the time when special bail was entered and notice of that bail given.†

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\* Cannon,  
manucaptor,  
ad. *Cath-*  
*cart*, ante, p.  
84.

† See *Grose*  
*sols. Camp-*  
*bell*, ante, p.  
115.

*W. P. Van Ness v. George Gardiner.*

THE last proclamation of a fine had been omitted ; it ought regularly to have been made last term ; the application now was, to have it made *nunc pro tunc*, and indorsed as of the last term.

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*Per Curiam.* We see no objection to it at present.

Rule accordingly.

*A. M'Gregor v. C. Loveland.*

*The same v. John B. Arnet.*

*The same v. The same.*

THIS was a question of practice, submitted to the decision of the court on the following statement :

The above suits were brought on notes exceeding two hundred and fifty dollars each; afterwards a sum of money was paid, and security given by *Loveland*, the indorser, by which the amount was reduced below 250 dollars: *cognovits* were then given for the residue by each defendant. It was understood at the time, by the defendant's attorney, that the judgments should carry supreme court costs. *Query.* May not the clerk tax them accordingly?

*Per Curiam.* No: the plaintiff should have taken his *cognovit* and entered his judgment for a sum above 250 dollars, to entitle to supreme court costs; they cannot otherwise be allowed.

*James and Samuel Watson v. Frederick Depester & Co.*

THIS and three other suits were commenced, against the above defendants and several others, on a

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policy of insurance on the brig *Defiance*, and a consolidation rule signed and entered. About a year afterwards the defendants, in the above suit, compromised with the plaintiffs, who cancelled the policy as to them; of this the defendants' attorney had no information, nor was there any rule to discontinue, or other rule entered, and the other suits proceeded. The principal cause went on to trial, and the jury found a verdict for the defendant, which was acquiesced in. The defendants' attorney thereupon entered rules for judgment as in case of nonsuit in all the causes, pursuant to the consolidation rule, and the costs were taxed and judgment rolls ready to be signed. It was now submitted to the court on these facts, to decide whether the rules for judgment, and the judgment for costs as in case of nonsuit, were regular or not; or, whether they ought to be set aside. N. B. At the time of compromise nothing was said about costs.

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*Hoffman*, as *amicus curiæ*, informed the bench, that in *Wallace v. Lockwell*, it had been decided, that if a party compromised without the knowledge of his attorney, and the plaintiff went on, each paid his own costs.

*Per Curiam.* In every suit each party is supposed to advance as his suit proceeds. If each has paid costs and then they compromise, the suit is settled; for the transaction imports no further proceeding is to be had; nothing more than a simple discontinuance to enter on record, and nothing being said about costs, each must pay his own. The parties ought to have informed their attorneys there was a compromise.

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*Hudson v. Henry.*

MR. HENRY moved for judgment of nonsuit against the plaintiff for not proceeding to trial. Notice of the motion had been sent to the adverse attorney by the mail.

*Per Curiam.* This notice is insufficient. A letter may miscarry; or the attorney may be absent when the mail arrives, or not immediately inquire for letters, though an affidavit of a plea sent by the mail might save a default. Let the defendant take nothing

\* See Cole &  
another ads.  
Stafford, *ante*,  
p. 110.  
Beebe ads.  
Paddock, *ante*, p. 135.

*Manhattan Company v. Smith, in custody.*

THIS case was brought up from the mayor's court. The application was to prevent the discharge of the defendant on account of the plaintiffs' not proceeding to execution in due time, according to the act for the relief of debtors with respect to the imprisonment of their persons; the counsel for the plaintiff relied on *Brantingham's* case, *ante*, p. 48. The court, without hearing any argument for the defendant, said the authority cited was conclusive.

LIVINGSTON, J. acquiesced because it had been so decided, but confessed he did not believe the legislature intended the construction put upon the act by the court, should ever be given to it. The rigour of the practice was, in his opinion, enough to condemn it; for he thought the neglect in the plaintiff ought to accrue to the advantage of the prisoner.

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*Steele and ux. ads. Tenant.*

*Steele, and Fuller, his bail, ads. Tenant, Assignee of  
the Sheriff of Washington.*

THE original suit was trespass *quare clausum frē-*  
*git*, in which *Steele* and his wife had been held to bail  
under the statute ;\* after the return of the writ the plaintiff obtained an assignment of the bail-bond on which he issued the usual process, filed his declaration on the first of *October*, 1802, and entered a default the 11th of *November*; on the 17th the partner of the plaintiff's attorney received, when in his office, notice of the retainer of an attorney on behalf of the defendants in the bail-bond suit, but no information was then given of any default having been entered. In *January* following final judgment was signed. On the eighth of *March*, 1803, the attorney for the defendants, in the bail-bond suit, was served with a notice of executing a writ of inquiry† in the original suit; a declaration also in the same suit was then delivered, which the plaintiff's attorney swore was merely to apprise the defendant of the nature of the demand; but the attorney of the defendant swore it was served absolutely, not on any condition, and that he did not know of the entry of the default in the bail-bond suit, or that any declaration had been filed; that acting under that impression he did not attend the execution of the writ of inquiry, or apply to the court last term. On these facts the defendant now moved, that the default and interlocutory judgment in the original action, and all the proceedings in the

\* 31st March,  
1801. c. 102.  
s. 3.

† Under s. 16.  
of c. 90. of  
31st March,  
1801.

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1803. bail-bond suit, be set aside, and the defendants, in the original cause, let in to plead.

*Per Curiam.* The court are of opinion the defendant's attorney was in default. He ought to have seen that the proceedings in the suit on the bail-bond were regular. He should have called after the default and tendered costs. We do not say, that the not disclosing the entry of the default in the suit against the bail amounts to a surprise, but it would have been rather more candid to have mentioned that circumstance. Let the judgment on the bail-bond stand as security, and the costs on that remain also. The default and subsequent proceedings in the original suit to be set aside on payment of the costs of entering the judgment under the statute, and executing the writ of inquiry. The defendant to plead *instanter* to the declaration filed, take short notice of trial, and pay the costs of this application.

LIVINGSTON, J. I think the costs on the bail-bond ought to be paid.

*William Lowry v. Andrew Lawrence.*

ON demurrer. The memorandum was of another term.

*Be it remembered,* that heretofore, to wit, on the third *Tuesday of July*, in *July term*, in the year of our Lord one thousand eight hundred and one, &c. came *William Lowry*, and brought into the said court then there his certain bill, &c.

The declaration was on a bill of exchange, made <sup>May Term,  
1803.</sup> in 1797, presented for acceptance on the first of *October*, 1801, and refused, of which notice to the defendant, who, on the 11th of *October* promised.

To this the defendant demurred, and showed for cause, that although the said declaration is entitled of the term of *July*, in the year of our Lord one thousand eight hundred and one, yet the said several promises and undertakings in the said declaration mentioned, are therein stated to have been made on the eleventh day of *October*, in the year last aforesaid, which is subsequent to the time of the exhibiting the *declaration* of the said *William* against the said *Audrey*, and for that it appears, by the said declaration, that the pretended causes of action therein specified had not, nor had either of them accrued to the said *William* at the time of the exhibiting his *said bill* in manner aforesaid. The defendant insisted, that by the practice of this court, the suing out the writ was the commencement of the action; and if so, the declaration showed on the face of it, no cause of action when the suit was commenced.

*Ogden*, for the plaintiff. It is contended on the part of the plaintiff that nothing appears on this record to warrant a judgment for the defendant.

By the course of the court the *filing* of the bill is <sup>2 Burr. 950.  
Johnson & al.  
v. Smith. See  
Lord Mans-  
field's opin-  
ion, 961.</sup> the commencement of the action in a legal sense.

The *latitat* is considered only as process.

May Term,  
1803.

Cowper 454.  
Foster v. Bon-  
ner.

1 Comyn's  
Digest, 103.  
Mod. Cases  
33.

The action is not deemed to be commenced until the bill is filed, though the real time of suing out the *latitat* is allowed to be shown, where it becomes material; as to prevent the running of the statute of limitations, &c. If such a necessity existed in this case the actual time of suing out the final process might have been shown by plea. But where it does not exist the fiction of law will be preserved, and especially so when it is in furtherance of justice. On this occasion, the true question therefore is, when, in a legal or technical sense, was this action commenced? This can only be ascertained by showing the time of *filing the bill*. The time of filing the bill may be examined into to show the time of commencing the action. It ought to have been shown by pleading in this case. Not being shown, the court are at liberty to presume that it was after the cause of action accrued. The caption of the declaration is matter of fiction, and not conclusive upon either party. If it be conclusive, all actions by bill of privilege; actions against attorneys of the court; actions against absent or absconding debtors, giving security to appear to any declaration which may be filed by the petitioning creditor, would be defeated in all cases in which the cause of action accrued, during the vacation in which the declaration is filed. Because, in all these cases, the declaration is entitled of the preceding term, and must necessarily be stated in the memorandum to have been brought into court of that term.—This doctrine involves no hardship upon the defendant; because, if in the first instance process be issued before the cause of action accrued, a judge will discharge on common bail. So if the bill filed before cause of action accrued, the actual time of filing it may

be shown and pleaded in abatement or in bar. In May Term,  
1803. this case it does not necessarily follow, that the cause of action did not accrue before the commencement of the action, and the time of that commencement not being shown, the court are at liberty, and ought to presume it to have accrued afterwards.

In addition to this general reasoning on this subject, it may be observed that, in this instance, the real cause of action is stated to have occurred in 1797; being the date of the bill of exchange and long prior to the issuing of process. It is the assumption, founded on that undertaking, which is stated to have been made in *October*, 1801; and the time of the promise being wholly immaterial, the court will, in this circumstance, see an additional motive for adopting the principle contended for by the plaintiff.

*Per Curiam.* This case comes before the court on demurrer. It was an action of assumpsit, and the declaration captioned of *July term, 1801.* The time laid in the declaration, at which the cause of action arose, is on the 11th day of *October, 1801.* To this there is a special demurrer, alleging for cause, that the action appears from the declaration to have commenced before cause of action arose. It is, we take it, well settled, that if the plaintiff, *at the commencement* of his suit, had no cause of action, a subsequent right would not maintain his action. And it has been settled in this court, in the case of *Carpenter v. Butterfield*, that as to every material purpose, the issuing the writ was the commencement of the suit--so that a

## CASES OF PRACTICE

May Term,  
1803.

note purchased by the defendant after that time could not be set off against the plaintiff's demand.\*

\* See *Crygiers v. Long, ante*, p. 106.

The declaration must be captioned of the term when the writ is returned served. This point is settled in the case of *Smith v. Muller*, and it is there also determined, that the plaintiff cannot recover any demand, after the term, when the writ is returnable, though, before the declaration is *actually filed*. Justice *Buller* there says, according to the ancient practice, the declaration was actually delivered, the same term the writ was returned, and it was only in ease of the plaintiff that the time of actual delivery was enlarged, but still it must be considered as delivered *nunc pro tunc*.

Upon the principles of these authorities, therefore, it must appear from the face of the declaration in this cause, and the court must necessarily intend the facts, that the writ was returned in *July* term, 1801, and of course the action, both in fact, and technically speaking, commenced previous to that time. But the plaintiff alleges his cause of action to have arisen on the 11th of *October* thereafter. We think, therefore, it appears upon the face of the record, that the action, was commenced before the right of action accrued. The time of actually filing the declaration cannot, as contended by the plaintiff's counsel, be considered the commencement of the suit; if, therefore, the defendant, by plea, had put the fact in issue, it would have been an immaterial fact; all the material facts appear by the plaintiff's own showing. In the case of *Ward v. Honeywood*, the judgment was reversed on writ of error, on the ground that it appeared on

Doug. 61.  
that case was  
on marshal-  
sea process,

the face of the record, that there was no cause of action when the suit was commenced—if this would be error after judgment, advantage may certainly be taken of it by demurrer.

May Term,  
1803.

where the  
proceedings  
are by *plaint*;  
and in an in-  
ferior court  
the *plaint* is  
as an origi-  
nal.

*Savage v.*  
*Knights*, 1.  
*Leon.* 302.  
See the ob-  
servation of  
*Ashurst*, J.  
in *Doug.* 62.

We are therefore of opinion that judgment ought to be for the defendant.

LIVINGSTON, J. In *England* it is settled, that the filing of a bill or declaration is to be regarded for every essential purpose as the commencement of a suit, *Vid. Cwps.* 454—but in *Carpenter v. Butterfield*, decided by the court, a different rule was adopted.—The issuing of a writ was there considered as the beginning of an action, so much so that the defendant was not permitted to set off against the plaintiff's demand, a note which he had obtained for valuable consideration between the sealing of the process and the arrest. This rule, to operate fairly, must be mutual—if an action begins by issuing a writ so as to deprive the defendant of a set-off in the case mentioned, neither ought the plaintiff to recover a demand not *then* due. My judgment, therefore, in favour of the defendant, is not founded on *British* authorities, but entirely on a former decision of our own.

#### *M'Neil's Case.*

THE prisoner had, together with two other persons, been convicted of a conspiracy at the last oyer and terminer, for the city and county of *New-York*, but had not appeared on his recognizance in time to receive sentence: he afterwards came in, and was now brought up, on his own petition, to have judgment

May Term, 1803. pronounced ; the public prosecutor appeared, but the record of the conviction not being made up and brought into court, the bench said they had nothing before them, on which to proceed ; and, therefore, admitted him to bail.

*Anonymous.*

THE notice of motion in this cause, was served on a person in the house of the attorney, and where he kept his office : but held not sufficient, as it ought to have been on a clerk in the office.\*

*Moyle v. Gillingham.*

NOTICE may be served, on an agent in town, on the first day of term, to show cause on the next day for non-enumerated motions ; but then, it must be accompanied with a sufficient excuse for not having been for the first day. If the excuse be received, the adverse party will have till next term, to send into the country to his principal, for counter affidavits.

*Abraham L. Brain v. Rodelicks and Shivers.*

IN this cause, it was necessary to examine a witness in the *Havanna* ; and, as that port was open only to certain privileged vessels, in *April*, 1802, a

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\* *Swartwout* ads. *Gelston, ante*, p. 81. "The service must be on some person in the office, and belonging there ; if nobody is there, it must be upon some one in the house, where the attorney resides, or the office is kept ; and if nobody is there, it may be left in the office."

rule for a commission was granted before issue joined, to prevent losing an opportunity of transmission which then presented itself. No return having been made, the cause was noticed for trial for the last sittings in *March*, 1803, when the defendant's attorney, seeing some witnesses in the court, whose absence, he feared, might delay the cause after the return of the commission, appeared, and examined them ; stating, however, the circumstances of his case, and that he begged to be considered as acting without prejudice to his future rights. He now moved to set aside the verdict, with costs ; the plaintiff having proceeded to trial, without vacating the rule for the commission.

May Term,  
1803.

*Per Curiam.* When a rule for a commission has been obtained, it suspends the cause till, on application to the court, a *vacatur* be ordered and entered. But, if the defendant appear, and examine witnesses, it is a waiver of his commission, and the *vacatur* is unnecessary. The motion must be refused.

*Codwise, Ludlow and Co. v. John Hacker.*

THE plaintiffs, in the sittings of *June*, 1802, at *New-York*, as owners of a ship, of which the defendant was captain, had, in an action against him, for deviating from his orders, obtained a verdict, subject to the opinion of the court, on a case to be made ; and he, in a cross suit, had recovered against them a larger sum, subject to deductions, in case, the opinion of the court should be against him, as to certain items, charged, and allowed by the jury.

May Term,  
1803.

A case was made on the part of the defendant, to which the plaintiff proposed amendments, which were adopted ; the cause was then noticed for argument, for the next *October* term, and also, for *January* term following, in *Albany*. But, it was then recollected, that some material facts had been omitted, without which, the case could not present the only important question in the cause. This was mentioned to the plaintiffs' attorney, who would not say whether he would consent to the amendments or not. The papers from whence they were to be drawn, and the case perfected, were in the hands of the plaintiffs' attorney, in *New-York* ; so, that the case could not be completed in *Albany*. No application was made to a judge to correct the amendments. Nor had cases been delivered.

*Hopkins* now moved, to set aside the original order to stay proceedings, that a case might be made, and for leave to enter up judgment.

*Riker* resisted the application, because the case was imperfect, and the papers from whence only it could be completed, were in the hands of the plaintiffs.

*Per Curiam.* We must deny the motion ; because, in the first place, there were cross verdicts to nearly the same amounts. Secondly, the cases were never perfected, and it did not appear to be exclusively the fault of either. Thirdly, the plaintiffs' attorney not having denied the omission of certain material facts, the court would presume they had appear-

ed on the trial, and ought to be a part of the case.— May Term,  
1803.  
Let the case be perfected within thirty days.

*Hopkins* prayed costs, insisting he had been regular.

*Per Curiam.* We consider, that the plaintiffs were irregular, in not answering when applied to, whether they would receive amendments or not.

N. B. It was said, by the court, that where a defendant, after verdict, makes a case, and notices for argument, if he does not appear at the time when called, judgment shall go: but when the plaintiff notices a case, made on the part of the defendant, and the plaintiff is not ready, it shall go down.

*Callagan and others v. Hallett & Bourne.*

THE plaintiffs were pilots of the port of *New-York*. The defendants, owners of a brig called the *Neptune*. The vessel had been driven on shore at *Barnegat*, to bring her from whence safe into *New-York*, the defendants had agreed to give the plaintiffs five hundred dollars, and the service having been performed, the present action was instituted to recover the money.

The declaration consisted of four counts: the first, an agreement with the captain on behalf of his owners; the second, on one with the owners themselves; the third, work and labour at the request of the defendants; the fourth, a *quantum meruerunt*. To this the defendants pleaded the general issue. A case was

May Term, 1803. reserved for the opinion of the court whether the action was maintainable or not.

*Pendleton*, for the plaintiffs. It has long been settled, that the master may, when in distress, hypothecate either vessel or cargo for necessaries to prosecute his voyage. *Moor*, 918.\* *2 Id. Ray.* 984.† *Noy*, <sup>Brigman.</sup> *Barnard v. Johnson*. 95. *A fortiori*, he may bind to his engagements, when the vessel must otherwise be lost. If then the action be maintainable, this can be the only tribunal; it cannot be in the admiralty, and the reason is, that court has jurisdiction in cases of hypothecation on account of the extraordinary interest, and because the contract is on the credit of the ship or goods and their safe arrival. Owners are not liable in the court of admiralty. *6 Mod. 2*. They must then be answerable here. Whether the contract was with the owners or the master is immaterial; for the contract of the master is obligatory on the owner. *1 Moll. 331.* sec. 14, 15. If the master ransoms, the remedy is against the owner. *Cornu v. Blackburn, Doug.* 619. and in *Yates v. Hall*, the plaintiff recovered on the engagement of the master against the owners, though the vessel, for payment of the ransom of which he remained as a hostage, was given up in satisfaction of the ransom bill. In addition to these authorities, the laws of the state render the contract valid.

*Boyd*, contra. Principles of general policy and the invariable leaning of the court are against this action; the words of our law are conclusive. The species of contract in which the master can bind his owners, and the distinctions from this case will appear to the

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court in 1 *Salk.* 35. 2 *Dall.* 194. 1 *Bro. Pa. Ca.* 284. May Term,  
and *Abbot on Shipping.* 1803.

*Per Curiam.* The defendant moves in arrest of judgment. The declaration states,

1st. That the defendants were owners of the brig *Neptune*; that the brig, when at sea and bound for *New-York*, was in distress; that the plaintiffs contracted with the master to bring her safe into port for 500 dollars; that they brought her in accordingly.

2d. The like against owners.

3d. The usual counts on a *quantum meruit.*

Three questions are raised :

1st. Whether the action is maintainable on the first count, which involves two questions :

1. Could the master, by such contract, bind the owners ?

2. Was the contract lawful, the plaintiffs being branch pilots belonging to the port of *New-York* ?

2d. Can the defendant move in arrest of judgment after attending the execution of the writ of inquiry, and examining witnesses ?

3d. May not the court order an inquiry *de novo* on the third count, in the event of the first and second being held bad ?

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1803.

The question of the right of the master to bind owners, it is not necessary to decide.

The legality of the contract is most material.

The act for the regulation of pilots and pilotage for the port of *New-York* (7 sess. ch. 31. s. 2 and 3.) makes it *the duty* of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and for neglect or refusal subjects them to a fine or forfeiture of their places; but for the encouragement of such pilots who shall distinguish themselves by their activity and readiness to aid vessels in distress, it enacts, that the master or owner of such vessel shall pay to such pilot, who *shall have exerted himself for the preservation of such vessel*, such sum for extra services as the master or owner and such pilot can agree upon; and in case no such agreement can be made, the master and wardens of the port are empowered to ascertain the reasonable reward.

It being made *the duty* of the pilots to assist the defendants' vessel, it was oppression in them to exact the stipulation in question. It would lead to abuses of the most serious nature if such contracts, founded on such considerations, were held to be legal. There are several cases in the books tending to show the leaning of courts of justice against the oppressions of persons in public trust, and the illegality of exacting previous reward for doing their duty. The law allows them sufficient compensation for extraordinary exertion after the service performed; which shows it was an object with the legislature to prevent undue

*Bridge and  
Case, Cro. Ja.  
103. Stoles-  
bury v. Smith,  
2 Burr. 924.*

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advantages being taken. We are, therefore, of opinion, the first and second counts are bad, as contrary to public policy and the spirit of the act. As to the second question, whether it be too late to move in arrest of judgment after attending the execution of the writ of inquiry, we are of opinion the authorities adduced do not apply to questions on the merits, but only to formal defects in the pleadings.

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1 *Sell.* 528.  
2 *Wile.* 380.

On the third point we are of opinion, on the authority of *Eddowes v. Hopkins*, in *Douglas*, that the plaintiff may, on payment of costs, have (if he solicits it) an inquiry *de novo* on the *quantum meruit*, reserving the question, however, whether, on such inquest, he shall be entitled to more than his legal allowance, not having made the prescribed appeal to the master and wardens.

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AUGUST TERM, 1803.

*Jotham Post v. William Wright and Robert Buchan.*

AN inquest had been taken in this cause, at the last sittings, in June, at *New-York*.

*Hoffman* moved to set it aside, on two affidavits; one made by the defendants, which stated, that they verily

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believed he had a good, substantial, and legal defence ; the other by the counsel in the cause. This last set forth, that he was counsel for the *Humane Society of New-York*, and, in that capacity, obliged to visit the gaol on *Monday* in every week ; that this cause being noticed for trial on a *Monday*, he came into court instantly after discharging his duty to the society, when he found an inquest had been taken in the suit ; that he, on the same day, wrote to the attorney of the plaintiff, offering to pay all the costs of the inquest, and to engage to try the cause in the *then* sittings, if the plaintiff would abandon his inquest, which he refused to do.

*Hoffman* also observed, the calendar had been gone through more than once, and that the plaintiff needed not to have lost the sittings but for his own obstinacy.

*Woods* relied on the counter affidavit of the plaintiff's attorney, which stated, that the cause was duly set down in its order, on the day-docket ; that it was regularly called and tried ; that when called on, —————, esquire, was in court, and in the hearing of the deponent, said he was of counsel for the defendants, but as he did not see his clients, nor any of their witnesses, he would not appear ; that on this the defendants were called, and an inquest taken.

*Woods* remarked, that, if after these facts the inquest should be set aside, there would be no end to these applications. A defendant had only to keep himself and his witnesses, or even his counsel out

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of the way, and be sure to gain a term whenever he Aug. Term  
pleased. 1803.

*Per Curiam.* All reasonable notice to attend and defend the suit, was given. The cause was on the day-docket, and there is no kind of excuse why the defendants were absent. They had a counsel in court, and might have been there themselves, with their witnesses. The defendants, therefore, can take nothing by their motion.

N. B. *Hoffman* urged strongly the rigour of the practice, that it would operate only against the attorney of the defendant, that this was the first instance of such strictness. The court answered, there must be a first time in all proceedings; that they found it necessary to enforce their rules, and had made a determination so to do, as the only mode of having them obeyed.

*John P. Ryers v. William Hillyer.*

SPENCER moved, on the common affidavit, for judgment as in case of nonsuit for not proceeding to trial.

*Hoffman* resisted the application, because the notice was titled *William Hillyer v. John P. Ryers* instead of *William Hillyer ads. John P. Ryers*: this, he said, was fatal, there being no such suit in existence as the one in which the notice was given, but he added, he would not have urged it except from its being

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Aug. Term, 1803. one of Mr. Colton's causes, whose state of health the whole court knew.

*Spencer*, contra, observed; that there could be no force in the objection, unless it appeared that the party had been misled :\* The notice was for judgment as in case of nonsuit for not proceeding to trial, therefore it must have come from a defendant. In the next place, it was on an affidavit, a copy whereof was annexed, and that affidavit was rightly entitled. It is a mere question of who shall pay costs. There has been no countermand, and the defendant kept all the circuit with his witnesses.

*Hoffman*. As this is the first default, will the court oblige us to stipulate?

*Per Curiam*. Stipulate to try at the next circuit for the city and county of New-York, and pay the costs of the present application.

*James Brandt, on the demise of William Rickets Van Courtlandt, and Philip Van Courtlandt, v. Matthias Buckhout and Abraham Buckhout.*

THE issue in this cause had been joined in January, 1801, and notice of trial given in the June fol-

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\* On the same principle, where a notice of executing a writ of inquiry "on Tuesday the 14th of January instant," was given, the court of C. B. refused to set aside the execution of the writ because the 14th was on a Thursday, saying it was clear the defendant could not have been misled. *Batten and Harrison*, 3 Bos. & Pul. 1.

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*Wining* : it, however, did not come on, in consequence <sup>Aug. Term,</sup> ~~of the defendant's applying for a commission to obtain testimony from *Virginia*.~~ <sup>1803.</sup> On the arrival of the commission in that state, it was found the witness had removed into *Kentucky*, whither he was followed, and his evidence to the interrogatories taken, on a deposition made before two justices of the peace. A copy of this, accompanied with an affidavit of the facts, was served on the plaintiff's attorney in *August*, 1802, and communication at the same time made, that a regular commission would be sued out and sent into *Kentucky*. On this the plaintiff did not notice for trial ; however, for not proceeding to which,

*Woods* now moved for judgment as in case of non-suit.

*Spencer* opposed the application as being too late, insisting it ought to have been made the very first term after the neglect.

*Per Curiam.* The defendant has not accounted for his delay ; if that be not done, and the application be not immediately after the *laches*, the default is waived, and cannot now be taken advantage of.

*Woods* hoped the court would order the plaintiff to stipulate.

*Per Curiam.* He is not bound to stipulate.

*Spencer* prayed costs for resisting the application.

*Per Curiam.* Let the plaintiff take them.

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**ORDERED,** That the defendant take nothing by his motion, and pay the plaintiff his costs of opposing.

*Peter A. Camman v. The New-York Insurance Company.*

THE plaintiff had, for himself and several other persons with whom he was variously interested, effected eleven policies on distinct parts of the cargo of the same vessel. The name of the plaintiff was in each insurance, but associated with different parties, according as he was connected. The point in dispute was the same in all.

*Hoffman* moved to consolidate the actions, or to stay proceedings, in ten of the suits till the eleventh was determined ; the defendants being willing to pay on the residue, if that should be determined against them. The object of his endeavour was, as he said, to save the enormous costs which would otherwise accrue.

*L. Ogden.* The contracts are several ; and though a number of actions on one policy will be consolidated, that is because the contract is one ; and therefore, the very reason of the practice in such a case, is sufficient to overrule the present application.

An application was made by myself to this court, for leave to consolidate five actions on five promisso-

try notes to the same plaintiff, and refused, because of <sup>Aug. Term,</sup> 1803.  
the diversity of the contracts.\*

*Per Curiam.* The contracts being separate and independent, it is not a case for consolidation, and not to be distinguished from that of the notes. There never was an instance of consolidating different policies.

*James Shuter v. Richard S. Hallett.*

D. L. OGDEN moved for a rule to vacate the rule for a commission which had issued in this cause, in the spring of 1802. The facts, as appeared by affidavit, were these :

A commission had issued at that time, in which the defendant had joined, but not being returned, another was sued out in November last, and as there were no hopes of the first being returned, the parties agreed that the testimony taken on the second, which was on the same interrogatories, should be read in evidence on the trial. After this, the cause was duly noticed, but the judge refused to let it come on, as the counsel for the defendant had joined in the commission.

*Per Curiam.* The commission is as much the defendant's as the plaintiff's, and he may take the bene-

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\* By the practice of the English courts, if the defendant be held to bail in two actions which might be joined, the plaintiff will be obliged to consolidate and have to pay the costs of the application. *Cecil v. Briggs*, 2 D. & E. 639.

Aug Term, fit of it on trial. We cannot, therefore, vacate the rule, but the plaintiff may have one to proceed to trial notwithstanding the commission.\*

\* See *Brain v. Rodelicks and Shivers, ante*, p. 176.

*Joseph Grover v. Benjamin Green.*

THE defendant was attending a reference, under a rule of the court of common pleas for *Cayuga*, in a suit, wherein he was plaintiff, and the present plaintiff defendant, when he (*Green*) was arrested by *Grover*, on a writ out of this court.

*Emott* moved for a rule, that the defendant be discharged out of custody, on common bail, the plaintiff having abused the process of the court, but no notice had been given of the motion.

*Per Curiam.* By this means any body may get himself discharged.

*Emott.* If the affidavit be false, the party may be inflicted for perjury.

*Per Curiam.* But the plaintiff may lose his debt. Take a rule to show cause the first day of next term, why he should not be discharged, and in the mean time, let proceedings be staid.

*Hugh Lackey and Joshua Briggs v. Daniel M'Donald.*

THE plaintiffs, in *July*, 1802, had stipulated to try this cause at the next circuit court, and did not do so.

*M. B. Hildreth*, on this ground, now moved for judgment as in case of nonsuit. Aug. Term,  
1803.

*Schoenhoven* read an affidavit, which was not denied, stating that the defendant, after the commencement of the suit, and before a trial could be had, was sentenced to the state prison, where he still remained, and prayed to discontinue without payment of costs.

*Van Ness*, amicus curiae, mentioned, that when the defendant rendered proceedings useless, the court was always disposed to permit a plaintiff to discontinue without costs. In *Jackson*, on the demise of *Ludlow, v. Webb*, after issue joined, the defendant abandoned the possession, and the lessor of the plaintiff having entered, did not notice the cause for trial. The defendant then moved for judgment, as in case of nonsuit, but the court denied his motion, and gave leave to discontinue without payment of costs.

*Per Curiam.* The opinion of the court is, that sufficient has been shown, to prevent the judgment of nonsuit. The defendant has, by his own act, deprived the plaintiffs of that remedy, which they might have had against his person; his body is out of their reach, and *that* by his own act. It is not, therefore, necessary, that they should proceed and incur expenses for nothing, as there is not any property from whence they can be reimbursed.—The plaintiffs, therefore, are entitled to discontinue, and without costs.

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1803.

*Rachel Malin v. Ephraim Kinney.*

*The same v. Nathan Lane.*

THESE causes were noticed for trial at the circuit held for *Ontario*, in *June*, 1802. The defendants attended with their witnesses, but the plaintiff not bringing on the causes, the defendants agreed to waive taking advantage of it, provided the plaintiff would consent that the two above suits should abide the decision of a case made in one by the same plaintiff against *George Brown*, which turned on the same point, and had, together with another of the same sort, been tried. The plaintiff acceded to the proposition, but at the last term applied to the court to be released from her engagement. This the court was pleased to order,

*Emott* now moved for judgment of nonsuit, and that the plaintiff pay the costs not only of not proceeding to trial in 1802, but those also for not trying at the last circuit. He contended that as the agreement was done away on the application of the plaintiff, the defendant had a right to those costs which he waived only in consequence of that agreement : The agreement was the consideration of the waiver, and the consideration being taken away, he had a right to insist on not waiving. Then as to the costs of the last circuit, it was clear he was entitled ; because, as the plaintiff had been released and had not tried, it was manifest she was in default and costs due.

*Stuart*, contra, showed, on affidavit, that the rule to discharge the agreement was made at the latter part of the last term, and that from the late information he received of it, he could not avail himself, at the last circuit, of the advantage it afforded.

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*Per Curiam.* The application is for judgment as in case of nonsuit, and to pay two sets of costs; those of *June*, 1802, and those of the last circuit. Four causes were depending: Two were tried, and, after the court rose, there was a stipulation that the two causes not tried, should abide the same event as those which had been tried. An application was made in *May* last to be relieved; that the two causes not tried might be restored, and the plaintiff not bound by his stipulation: This was ordered, and the causes restored as in *June*, 1802. If the plaintiff was relieved, the defendant was also; and then the stipulation being vacated, the causes must stand in the same situation as in *June*, 1802. If the defendant had then applied, nothing appears why the rule should not then have been granted, at least a rule to stipulate and pay costs. The only reason to excuse now offered is, that the plaintiff did not receive notice of his own rule. Both circuits mentioned have passed without trial; therefore the defendant must have the effect of his motion, unless the plaintiff stipulate to try the cause at the next circuit, and pay the costs of that in *June* last.

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*Ambrose Spencer v. Samuel B. Webb, on Scire Facias.*

THE facts, as they appeared by affidavit, were as follows :

The defendant was served with a *scire facias* on *Tuesday*, the 3d of *May* last, which was returned *scire feci* on the 10th. On the same day the plaintiff entered a rule for the defendant to appear in four days and plead in twenty after notice, or that his default be entered: Notice of the rule was not given, nor was it put up in any conspicuous part of the clerk's office, nor was any affidavit of notice on file. Default was entered, without any such affidavit, on the 14th of *May*, on which day the plaintiff entered his judgment also. The plaintiff swore to a just and material defence, and that he had paid the plaintiff six hundred dollars which had not been allowed him, and offered to let the judgment stand as a security.

On these grounds *Van Vechten* moved to set aside the default and judgment thereon, and the defendant be let in to plead.

*Spencer.* There are several grounds of objection taken to the proceedings. One is, that notice ought to have been given of the return of the *sci. fa.* and of the rule entered. From the fourth rule of this court,  
• *Ans.*, p. 2. made in *April* term, 1796,\* it appears, that rules to appear on *sci. fa.* and in ejectment, are placed on the same footing. It is not necessary, on entering the rule, to give notice that the rule has been entered.

The notices by the *sci. fa.* and in ejectment, by the declaration, are tantamount. When the attorney appears, then notice is required: But a *sci. fa.* is notice in itself. The default, therefore, being regularly entered, must stand. The next question then is, whether, if the proceedings are correct in entering the default in four days, the court will let the defendant in, on the merits? *Griswold v. Stoughton*,<sup>\*</sup> decided Aug. Term, 1803. <sup>\* Ante, p. 146.</sup>

the last term, is in point, that as there is no account given for not appearing, the default is correct, and will not be set aside. There is no excuse for not entering an appearance, and for four days the defendant certainly slept. In *Edwards* ads. *M'Kinstry*, ante, p. 125. the court said that a default must always be accounted for.

*Graham*, as *amicus curiae*, observed, that it being a point of practice of some importance, he took the liberty to mention, that according to the *English* practice when, on a *sci. fa.* to receive, two *nihilis* were returned, judgment was signed of course on showing the returns to the officer.

*Van Vechten*. We are not to obtain the effect of our motion for two reasons. Because according to the *English* practice there are no rules on a *sci. fa.* and because no account is given for the default. As to the first, whatever the practice may be in *England*, our courts have established that a four-day rule is to be entered on the return of the writ, and then the ordinary rule is to be given, and if the default be not entered, the defendant may come in at any time. A *scire facias* is to all intents a new suit, and therefore there should be the same practice as in other cases;

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there may be a *plea*, &c. In this the default has produced no injury. There could be no judgment till next term: Therefore this rigid rule of saying that if you do not account we will not hear you, though you give evidence of reasons for our interference, can have no force when we apply to the discretion of the court. The power used in these cases is founded on justice, and whenever any thing like injustice presents itself, the court will interpose and see that no advantage is taken. Here the defendant offers to let the judgment stand, therefore the plaintiff runs no risk, as the defendant's lands are bound. He swears six hundred dollars have been paid on the judgment: The question then is, whether the defendant does not necessarily deserve favour. Whether the plaintiff shall have execution for six hundred dollars more than are due when merits are sworn to. That the plaintiff is able to repay it, is no answer: the oppression of thus wringing so much from the defendant may be intolerable. Notice, either express or constructive, is necessary to a default; here there is neither. *Griswold v. Stoughton* does not apply; it was a mere irregularity, and no affidavit of merits. The court cannot too much bear in view that no injury can result by letting the defendant in to plead.

*Spencer*, in reply. I have strong doubts whether on a *scire facias* there can be any defence\* except *nul* *tiel record*, or the judgment satisfied.

\* To a *sci. fa.* the defendant may plead in abatement, or in bar. 2 *Inst.* 470. But he can plead nothing in bar, which he might have pleaded to the original action. Where, therefore, the judgment was on a warrant of attorney, as the defendant could have had no opportunity of pleading, the court of K. B. has ordered an issue to let in the defence of usury. *Cook v. Jones*, Cwp. 727. The defendant may also plead

*Per Curiam.* It appears that the defendant did not enter any appearance before the expiration of the rule, nor indeed was it until some weeks after, that any appearance was entered. It is suggested in answer, that notice ought to have been served of the entry of the rule: this is on the other hand denied; and rightly. The default, therefore, is regular, and no reason whatever is assigned how it has been incurred. In all such cases we have determined to hold the party to his default. The rule\* of this court says "Upon the return of writs of *sci. fa.* if the defendant be returned warned, or the second writ be returned *nihil*, the defendant shall appear in four days, or judgment shall be entered by default." Therefore the entry of the default is perfectly consistent with the practice of the court, and must remain: But as judgment ought not have been signed till four days after, and it appears to have been done on the very day, that is irregular, and therefore must be set aside.

\* Rule of October, 1791, ante, p. 38.

*William Neilson v. Catharine Cox, Magdalene Beekman, Abraham H. Beekman, and Johannah his Wife.*

THIS was an application on a point of practice in partition. The defendants had not appeared, and as the act does not specify any mode of compelling

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in abatement that there were not fifteen days between the teste and return. *Nares v. Earl of Huntingdon*, Lut. 12. and for want of these fifteen days, the supreme court has set aside, on motion, the proceedings on a *sci. fa.* *Woodman and others* ads. *Little, ante*, p. 60. as a *scire facias* is a judicial writ. See *Com. Dig.* title Abatement. [H. 14.]

## CASES OF PRACTICE

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them to come in, *Woods*, on behalf of *Riggs*, moved that the following rule be made absolute, which the court, after perusal, was pleased to order.

## RULE.

New-York Supreme Court. William Neilson v. Catharine Cox, Magdalene Beckman, Abraham H. Beckman and Johannah his wife.	<b>In Partition.</b> The defendants having neglected to answer or plead to the petition of the plaintiff, within the time allowed them, by a rule of this court for that purpose, and it appearing by the said petition, that the plaintiff is seised in fee-simple, as tenant in common, of two undivided fifth parts of the premises in the said petition mentioned, and that the defendant, <i>Catharine Cox</i> , is seised in fee-simple, as tenant in common, of one equal undivided fifth part thereof, and that the defendant, <i>Magdalene Beckman</i> , is seised in fee-simple, as tenant in common, of one equal undivided fifth part thereof, and that the defendants, <i>Abraham H. Beckman</i> and <i>Johannah his wife</i> , in right of the said <i>Johannah</i> , are seised in fee-simple of one equal undivided fifth part thereof, which not being denied, THE COURT DOTHE, THEREFORE, DETERMINE the rights of the said parties to be, as in the said petition is stated, whereupon, and on motion of Mr. <i>Riggs</i> , attorney for the plaintiff, IT IS ORDERED, that partition of the said premises be made between the said parties, according to their said respective rights, and it is ordered, that A. B. C. D. and E. F. being three reputable freeholders of the city of New-York, be, and they are hereby appointed commissioners to make the said partition among the said parties, quality and quantity relative-
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ly considered, according to the respective rights Aug. Term,  
of the parties aforesaid. 1803.

N. B. The commissioners are named by the party to the court, and if approved of, appointed according to the nomination.

*Cyrus Jackson v. Rodolphus Mann.*

WOODWORTH moved for judgment as in case of nonsuit, for not proceeding to trial, according to notice, on an affidavit, stating, that the cause being duly noticed, the defendant issued, and served subpoenas on his witnesses, after which, the notice was countermanded.

*Schoenhoven*, contra, read an affidavit setting forth, that the plaintiff, for want of a material witness, who could not be then found, was unable to proceed to trial, and, that notice of countermand had been given four days before the circuit court; he, therefore, insisted there was no ground for the application, and that from the principle of *Brandt v. Buckhout*,\* the defendant could not only take nothing by his motion, but the plaintiff was entitled to his costs for opposing.

\* *Ante*, p.  
186.

*Woodworth* distinguished this from the case mentioned, by the defendant's having been here put to costs.

*Per Curiam.* The only question here is, who shall pay the expense. The plaintiff must, certainly, bear the charges of his own countermand. *That*, and

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1803. the notice, are equally his acts ; the expenses, therefore, incurred after notice, always fall to him when he countermands. The judgment of nonsuit must, therefore, be refused, but the plaintiff to pay the defendant the costs of subpoenaing his witnesses prior to the countermand.

*Robert Campbell v. Timothy Munger and others.*

THIS was a motion for judgment as in case of nonsuit for not proceeding to trial. The affidavit, on which it was grounded, stated, that issue was joined in January term, 1802 ; that the cause was duly noticed for the circuit in the same year ; that it was not then tried, and was noticed again for the circuit in May last, when it was not brought on, though it was one of the oldest issues on the calendar, and no countermand of trial had been given.

*Van Antwerp* resisted the application, on a deposition made by himself, admitting the notice for the last circuit, but setting forth also, that this cause, as well as another at the suit of one *Elijah Montgomery* against the same defendants, were actions of trespass *quare clausum fregit*, involving the same question and same defence ; that on the trial of the said cause, *Elijah Montgomery* became nonsuit at the direction of his honour, Mr. Justice *Kent*, to which direction an exception was then taken, and, by consent of the defendant's attorney, the making up of the case was postponed till this term ; that it was understood and agreed, between the deponent and the defendant's attorney, that the decision in one of the causes should be conclusive in the others ; and thereon, shortly after the trial, so as above said to

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have been had in the other cause, the witnesses for both parties were dismissed and that it was very doubtful whether a trial in this present action could have been had.

*Per Curiam*, delivered by LIVINGSTON, J. This is a motion for a nonsuit, for not proceeding to trial at the last circuit in *Saratoga*. It appears, that this, as well as another action of *Elijah Montgomery*, against the same defendants, was noticed for trial at that circuit; that they were all actions of *quare clausum fregit*, involving the same questions and the same defence. The action of *Montgomery* was tried, and the plaintiff nonsuited, by direction of Judge *Kent*. To his opinion an exception was taken by the plaintiff's counsel. The plaintiff's attorney upon this, thought it unnecessary, until the opinion given by the judge could be reviewed by this court, to bring on the trial of this cause; and he swears that "it "was understood and agreed, between the defendant's attorney and himself, that a decision in the "cause tried should be conclusive in the other, and "that, thereupon, shortly after the trial, the witnesses "of both parties were dismissed."

Without relying much on the agreement of the attorneys, which was not in writing, the court think the plaintiff has accounted satisfactorily for not bringing this cause to trial. He noticed it in good faith, and appears to have been prepared to try it, but finding the opinion of the judge against him in another cause embracing the same questions, and depending

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## CASES OF PRACTICE

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on the same evidence, it would have been folly in him  
to proceed in the others until the judgment of this  
court could be had. We think, therefore, that he  
ought not to stipulate, and that the costs for not pro-  
ceeding to trial abide the event of the first.

*David Combs v. Peter Wyckoff.*

THE present action was instituted to recover da-  
mages for not delivering a boat alleged to have been  
purchased by the plaintiff.

*Woods* moved to set aside the report of the referees  
on an affidavit, made by the attorney in the cause,  
stating these grounds : that the witnesses of the de-  
fendant were seafaring men, and that there had been  
an express agreement between the deponent and the  
plaintiff's attorney, that the referees should not make  
up their report until the testimony on the part of the  
defendant could be obtained ; yet, notwithstanding  
this agreement, the referees had reported without  
waiting for the evidence on which the defendant re-  
lied ; that a sum had been allowed the plaintiff for  
a loss, said to have been sustained by not being ena-  
bled to carry a quantity of wood to New-York,  
though it was proved and even admitted, that a part  
of the wood was previously sold by the plaintiff, and  
the residue might have been conveyed to New-York,  
had he thought fit ; that the referees were nominated  
by the deponent, without the knowledge of the defen-  
dant, between whom and one of them a quarrel had  
taken place, which was not made up ; that by the  
next circuit the defendant hoped to be able to procure

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testimony which would at least diminish the damages Aug. Term.  
against him. 1803.

*Skinner*, contra, read his own deposition, setting forth that he did not recollect the agreement above mentioned, and that at least it was not in writing ; that the referees met several times, and were as often adjourned at the request of the defendant's attorney under the pretence of not being able to procure the attendance of his witnesses ; that at the last meeting the defendant's attorney declined summing up, and so far from any enmity existing between the defendant and one of his referees, the very party named as being inimical was his special bail.

*Per Curiam*, delivered by LIVINGSTON, J. The defendant moves to set aside the report of referees, alleging.

1. That it was agreed by the plaintiff's attorney, that no report should be made until the defendant's witnesses could be procured, which was afterwards disregarded.

This agreement not being in writing, and being denied by the plaintiff's attorney must be laid out of sight. The court cannot, too frequently inculcate the necessity of reducing to writing all agreements between gentlemen of the bar. Many mistakes, much misunderstanding and controversy will, by this measure, be avoided. In the present case it appears that two months elapsed before the report was made, which was allowing sufficient time for the defendant to produce his witnesses. If they were abroad, he

Aug. Term, 1893 might have applied to the court, (for a term intervened between the appointment and report of the referees) for an order on them not to proceed for a reasonable time, which would have been granted, or a judge at his chambers would have ordered the proceedings to stay until application should be made to the court.

2. Another objection is, that a sum was allowed, which was not proved to be due. Of this allegation there is no satisfactory proof, and therefore we can take no notice of it.

3. A third objection is, an enmity between the defendant and one of the referees.

This referee, it is to be observed, was nominated by the defendant's attorney, and although he might have been ignorant of the quarrel spoken of, the defendant, by his acquiescence in the appointment, and submitting the cause to his decision, cannot now avail himself of this challenge. He should have applied to the court to remove him and appoint another. It is somewhat remarkable, however, that the referee who is repugnant or hostile to the defendant, should be his special bail in this very cause.

4. The defendant states, that "he can now introduce evidence to diminish *at least* the damages reported." This is very loose, to say the least. Why was not this testimony obtained before? And to what extent will the damages be reduced, if it be offered now? Will it justify a diminution of only one dollar or less? If so "*de minimis non curat lex*," and

if the discovery had been made even prior to the Aug. Term,  
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report, it would be no reason for disturbing it. Let \_\_\_\_\_  
the defendant take nothing by his motion and pay the  
costs of this application.

*The People v. Harry Croswell.*

THE defendant had been convicted before his honour, Chief-Judge LEWIS, at the last circuit, held in and for the county of *Columbia*, on an indictment for a libel on the President of the *United States*. The proceedings were originally commenced before the justices in general sessions, from whence they were removed into this court, and went down to the circuit in the usual manner. On his conviction recognizances were taken for his appearance the first day of term to receive judgment, but his counsel considering the chief-justice to have totally misdirected the jury, were rather at a loss how to bring the matter before this court. It was resolved by the bench, that on the cause being brought up and sent down to the circuit, the suit, though in its nature a criminal prosecution, took the course of a civil action; that within the first four days of the term ensuing the conviction, a motion in arrest of judgment might be made, or the parties may make a case, and bring every thing fully before the court. This measure they advised, as being in the present instance more explicit, and it being adopted, they gave day till the fourth day of next term, taking recognizances from the defendant and two others for his due appearance, himself in 500 dollars, his sureties in 250 dollars each.

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1803.

*Lusher v. Walton.*

**VAN VECHTEN.** This is a motion for a rule to refer. The affidavit states there are long accounts to adjust.

\* *Ante*, p.  
148.

*Emott.* I must oppose it. The notice does not mention the name of the referees; from *Bedle v. Willett*,\* decided last term, this is necessary.

*Per Curiam.* If the cause contains long accounts you cannot try it.

*Spencer* observed to the court, that a cause could not be referred at the circuit; but from the case cited, the application might be renewed the next non-enumerated day.

*Emott.* If the court say they will hear it, I shall waive the objection.

*Per Curiam.* The omission must be accounted for, and therefore we cannot say we will hear it. All notices must be for the first day; if not, an excuse must be offered. But a party's misapprehending a rule has frequently been received as an excuse. The decision quoted has altered the former practice, and if the party will swear he did not know it, he may apply again.

*Emott* waived his objection as to the omission of the names.

*Van Vechten* read his affidavit and another in support of it. Aug. Term, 1803.

*Emott* opposed the rule on a deposition by the plaintiff stating that an account between him and the defendant had been long ago settled, on which there appeared a certain balance due, for which the present action was brought, and that he believed the matter in dispute involved points of law.

*Per Curiam.* From the plaintiff's affidavit it does not appear there was a final closure of accounts, so as to entitle to oppose the rule; besides, there are two affidavits against him; the weight of evidence must, therefore preponderate, and his single affidavit must give way. His second ground for resisting the application is, that on the examination questions of law will arise. This, if properly stated, would have been a good reason for denying the rule; but on that point the affidavit is defective: it states his information and belief that it will arise; it ought to have said that "he is advised by his counsel," and even then to have set forth the particular and specific point, to satisfy us that it did exist. For these reasons, therefore, as the first taken objection is waived, the plaintiff's affidavit is insufficient and the defendant must take his rule.

*Jackson, on the demise of Joseph Winter, v. Martin M'Evo, tenant in possession.*

WOODS applied to vacate the judgment entered against the casual ejector, and to admit *Henry Mas-*

Aug. Term, ~~1803.~~ *terton* to be made defendant, on such terms as the court might be pleased to order.

From the affidavit of *Masterton*, it appeared, that the suit was instituted to recover possession of forty-five acres of land in the county of *West-Chester*, to which he claimed title, and has a real and substantial defence to make : that, on the 26th day of *July* last, the deponent discovered in the book of common rules of this court, that a rule for judgment against the casual ejector had been entered in the above cause, on the 12th day of *May* preceding ; that the tenant in possession never informed the deponent of any declaration in the said suit having been served upon him, till a long time after the rule for judgment had been entered ; that the deponent believed the knowledge of it was withheld from him, owing to a good understanding between the lessor of the plaintiff, and the tenant in possession, to prevent *that* defence being made, which the lessor of the plaintiff was, previous to the commencement of the above suit, told by the deponent he would make, and that on search he finds no record has been filed in the above cause.

These facts and allegations, he contended, were tantamount to a positive assertion of title, that it was impossible without one to have a real and substantial defence. That nothing would be lost by the plaintiff, as a trial might be had at the circuit in *September*. That the question would then fairly come up, whether the deponent or *Winter* was really entitled.

RADCLIFF, J. There does not appear to be any <sup>Aug. Term,  
1803.</sup> relation between *Masterton* and the tenant.

Woods. Perhaps the affidavit does not go quite far enough in stating that expressly, but surely it may well be gathered from the whole.

Emott, contra. The deponent does not swear to any title; he only says he has a claim: he does not swear that he is the landlord; not even that there is a privity between him and the tenant. If then there is no title, if he is not landlord, and if there is no privity, how can he be made a defendant? If a man may thus come in and vacate a judgment, without any complaint from the tenant, there is not one which may not be set aside. There is nothing stated which shows that notice of the ejectment ought to have been given to the deponent. The tenant is not obliged to hunt out all persons who have claims; he can only be expected to communicate to his privies.

Per Curiam. The party can take nothing by his motion.

Jackson, on the demise of Rodman, v. Adam Brown.

SPENCER moved for judgment, as in case of nonsuit, for not proceeding to trial. The notice was served on the first day of term, for argument on this. The affidavit accounted for its not being noticed for the first day, by stating, that it had been delivered, on the twenty-sixth of July, to a person who was

Aug. Term, 1803. then about leaving *Hudson* for *Albany*, but who had either lost it, or left it behind with some papers of his own.

*Peter Keehnen* opposed the motion, by an affidavit of the indisposition of both attorney and counsel in the cause, when too late to employ others.

The cause was countermanded, but after the circuit began.

*Per Curiam.* The excuse is sufficient to prevent granting the judgment applied for, but the plaintiff must pay the costs of not proceeding to trial. It was a misfortune, it is true, that the parties should have been afflicted with sickness, but it is a misfortune that ought not to fall on the defendant.

*Jackson, on the demise of Elkanah Watson, v.  
John Marsh.*

*W. Woods* moved, on the common affidavit, for judgment as in case of nonsuit for not proceeding to trial.

*Emott* resisted it by a counter affidavit, setting forth that the cause was duly noticed for *Cayuga* county, but, nine days before the trial, the defendant served a notice to produce papers, which were in *Albany*.

*Emott* stated some circumstances tending to show tricking practice, but nothing of that sort appeared by the affidavit.

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*Per Curiam.* What is the distance from the county court in Cayuga, to Albany?

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*Emott.* One hundred and eighty miles.

*Per Curiam.* The plaintiff must stipulate and pay costs. There is no proof of want of time.

*Samuel B. Webb v. Thomas Wilkie.*

THIS was an action on a sealed note, dated on the thirtieth of the month. The declaration stated the date to be the thirteenth. *Emott* on the first day of term, had obtained a rule to amend the declaration by striking out the word "thirteenth," and inserting the word "thirtieth." No person appearing to oppose, the motion was granted of course, and without imposing terms.

*Van Vechten* now applied to vacate that rule, and that it be ordered, that the amendment be on the usual terms. This, he said, was necessary, because, the plea of *non est factum*, which was then proper, might now be highly the reverse. The court was always disposed to set things right, if it lay in their power. They never could mean that the plaintiff, who had been guilty of a mistake in his declaration, should have liberty to amend *that*, and the defendant be held to a plea that might be inapplicable. Besides, there was ample time to give a plea before the next circuit, and surely the court will not shut out the defendant from pleading *de novo*, when his first plea was the result of the plaintiff's misstatement.

Aug. Term, 1803. *Per Curiam.* Let the former rule be vacated, and the plaintiff amend on the usual terms.

*William Gilliland v. Joseph Morrell.*

THE affidavit that was read stated, that in *October*, 1802, a motion was made on the part of the defendant for judgment, as in a case of nonsuit ; which no one appearing to oppose, was granted as of course. The judgment, thus taken, was, in the same term, set aside by the plaintiff, on the usual terms of stipulating to try the next circuit, and paying the costs of not proceeding to trial. The stipulation was entered into, the costs taxed, and demanded, but not paid, and now continued unsatisfied ; that, therefore, and as the defendant's only witness could not be found, he did not attend by himself or attorney, at the last circuit in *April*.

On these facts duly sworn to, and on an affidavit of the defendant, that he had a good and substantial defence, as informed by his counsel, which he verily believed to be true ; that on the merits, the plaintiff could not recover, and that a material witness was wanting, without whose testimony the defendant could not proceed to trial, but which he could procure by the next circuit,

*Van Vechten* moved to set aside the verdict, and grant a new trial.

*Woodworth*, contra, produced a certificate from the clerk of the circuit court, that the trial of the above cause was had on the eighth day of *April* last,

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when Mr. *Van Vechten* appeared for Mr. *Fisk*, attorney for the defendant. On this, he contended, every irregularity was waived, and the verdict must stand, otherwise the chance of a verdict might be taken at any time after a little advantage obtained, and in case of a want of success, a motion to set it aside resorted to.

*Per Curiam.* This is an application to set aside a verdict. There are many facts stated. With respect to the entry of the rule for setting aside the judgment, as in case of nonsuit, there may be some doubt : The clerk finds no rule entered, but as there was a stipulation filed, the court take it for granted that it was on the usual terms. It is necessary, however, that in all cases of stipulation, there should be a demand of costs ; this demand should be accompanied with a copy of the rule, and if the costs be not paid in twenty days after, then the party may enter up judgment of nonsuit, and take the effect of his application. The defendant swears, that he did present a bill of costs, but does not say it was with a copy of the rule annexed ; this, too, was on the agent, and not on the party, or his attorney. The defendant, therefore, has not been correct in his proceedings, and if the demand was not regular, the plaintiff was regular in noticing his cause for last April, and bringing it on to trial. But, admitting that in so doing, he had been guilty of an irregularity, the defendant's appearing on the trial, is a waiver of all advantage to which he might, otherwise, have been entitled. It was decided last term, in the case of *Brain v. Rodelicks and Shivers*,\* that if a party <sup>Aute, p.</sup> appear, he waives all irregularity. But it has been <sup>176.</sup>

Aug. Term, 1803. shown there was not any ; and if there was, the conduct of the defendant, has placed the case in the same situation as if there was not. The plaintiff, therefore, is regular. Against this, is read an affidavit of merits : on such an affidavit, the court will not set aside a regular verdict. There is no irregularity ; the defendant appeared, and has shown no excuse why he did not defend ; for if his witness could not have been obtained, the court, on the common affidavit, would have put off the trial. The defendant must take nothing by his motion.

*Salmon Cogswell v. Evert Vanderburgh.*

WOODWORTH, on the part of the defendant, moved to set aside the default, and all subsequent proceedings on two affidavits, made by the defendant and another person, stating that a *capias ad respondendum* in this suit, was duly issued and served in the month of November last ; that in February following, the defendant called on the plaintiff, and offered to pay part of the debt, if he could have time for the residue ; that this being agreed to, the defendant paid 300 dollars, and the plaintiff promised to stay all proceedings ; the defendant's affidavit further showed that he had frequently called on the plaintiff to settle the residue, but that he was either from home, or engaged in company, and had, notwithstanding his agreement to stop the suit, gone on, obtained a judgment by default, and taken out execution ; that the defendant, relying on the agreement, had not employed any attorney, and the execution was for more than was due, credit not having been given the defendant for an account which he had against the plaintiff. The affidavit,

*Woodworth* said, in addition to its being supported by the deposition of another person, carried internal evidence of its truth. It was not natural to suppose that a man should pay, after an arrest, so large a sum, on account of the debt, under no kind of agreement, but leave himself open to an execution for the residue, the very next moment. He therefore hoped the court would set aside the whole proceedings, as being in violation of every principle of good faith.

*Van Antwerp*, contra, read a long affidavit by the plaintiff, denying the receipt of the money on any condition, and swearing to the justness of his execution: But the denial rested on his own testimony alone.

*Per Curiam.* This is an application to set aside the judgment, and all subsequent proceedings. The affidavits are very lengthy, and so far as they relate to merits, we put them totally out of view, for on that point they cannot be received, the plaintiff having been perfectly regular, according to the rules of this court. But the motion is made on the further ground of surprise. To this effect the defendant has sworn, and his testimony is corroborated by that of another witness to the same effect. On the other hand may be opposed the positive denial of the plaintiff. If the weight of testimony be to decide, it will be found with the defendant. There has at least been a misunderstanding in this business. The defendant thought he paid his money that the suit might not go on, and therefore did not make any defence. It is evident some great mistake has been made; the plaintiff, however is perfectly regular, and as each side may have thought himself right, the judgment

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1803. and proceedings must be set aside on payment of costs, pleading issuably, and taking notice of trial for the next circuit.

*Joseph Hawkins and others v. S. Bradford.*

VAN VECHTEN moved for a rule, against the referees in this suit, to show cause, why an attachment should not issue against them for not making up their report, or that they be *ordered* so to do. The affidavit on which the application was founded, set forth, that at the meeting of the referees, after the counsel of the plaintiffs had opened their case, and stated the nature of their demand, the counsel for the defendant presented a plea to the referees on receipt of which they refused to hear any testimony on the part of the plaintiffs, and neither reported any thing due to them, nor did they make any report in favour of the defendant.

*Spencer*, contra, resisted the application, and submitted to the court a special statement of the matter in the nature of a report. The facts as there stated were, that after the due assembling of the referees, &c. they called on the counsel of the plaintiffs to specify his clients demand, which, excepting the question of interest, was originally admitted by the defendant's counsel to amount to about 1,400 dollars, but that there was a defence, which would supersede the necessity of proving the exact sum claimed, though it might be ascertained by the books and bills before the referees ; that the defence was payment of 1,469 dollars in full satisfaction, for proof of which, a receipt was offered in evidence, and an acknowledg-

ment, under the hand of the defendant's attorney; Aug. Term,  
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admitting certain things which the subscribing witness would have sworn to, if present. That the plaintiffs objected to the admission of this testimony, but before the question of admissibility could be argued, the defendant produced the following plea.—

"And now at this day, that is to say, on the 19th day  
"of July, 1803, before *George Hale, Samuel Edmunds* and *Roswell Hotchkis*, referees herein appointed, it being the first day and time of their meeting hereon, and upon the matters referred to them in the above cause, comes the said *John*, by *Erastus Root*, his counsel, and says, that the said *Joseph*, &c. ought not further to maintain their said action against him, the said *John*, because, he says, that after the 14th day of *May* last past, from which day, day was given to the said referees, to make their report until the first *Monday* in *August* next, before the justices of the supreme court, &c. at the city-hall, of the city of *Albany* aforesaid, the aforesaid action was continued, to wit, on the 28th day of *May*, in the year aforesaid, at the city of *Albany*, in the county of *Albany* aforesaid, the said *John* did pay to the said *Joseph*, &c. the sum of one thousand four hundred and sixty-nine dollars in full satisfaction, and discharge of all and singular the matters and things, and the sums of money due to the said plaintiffs, and for the recovery whereof, this aforesaid action hath been brought and prosecuted, and which said sum of one thousand four hundred and sixty-nine dollars, was then and there accepted, taken and received by the above plaintiffs, in full satisfaction and discharge of all and

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"singular matters and things, and of the sums of  
"money due to them, and for the recovery whereof,  
"this aforesaid action hath been brought and prose-  
"cuted, and this, &c. wherefore," &c. That there-  
on the referees adjourned the further hearing and re-  
turned the said plea.

This was a report; it was all the referees could do as they could not undertake to decide whether the plea was good or not, that being matter of law.

*Per Curiam.* The motion is, that the referees be ordered to make a report, they having, instead of that, made a special return of all the facts, to which they have annexed the plea of the defendant, offered to them at the hearing. The application must be granted; therefore, let the rule be, that the referees report by the first day of next term.

N. B. After giving the opinion of the court, KENT, J. observed, that their honours would advise the referees in making up their report to allow the receipt, if they believed it genuine, and to have been fairly obtained, in order that the plaintiff, on whose affidavit the application was made, if he thought himself aggrieved, or that it was improper to allow a receipt given after the rule to refer, might apply to the court to set aside the report on that ground, at which time the question might be fully argued.

*The Court* desired that all cases submitted to them without argument, should be so indorsed, because

they might otherwise be laid aside, under an idea Aug. Term,  
that an argument would take place. 1803.

*Peter Renaudet v. Ephraim Crocken.*

THIS was an action of trespass *quare clausum friggit*, tried at the *May* circuit, for the county of *Saratoga*, in the year 1803, before his honour Mr. Justice *Kent*. The only questions raised, for the determination of the court, were :

1st. Whether, if a trespass be committed in a part of a town, which, by a division made before the commencement of the action, is annexed to another township, the plaintiff can declare as for a trespass committed in the township where the *locus in quo* was originally situated ?

2d. Whether a surveyor, acting under the authority of a person appointed by virtue of a power of substitution in a letter of attorney, ought to be admitted to testify to the facts of such survey, without showing the letter of attorney, though it was acknowledged to exist ?

3d. Whether an agent, having received several sums of money on account of trespasses alleged to have been committed on the lands of his principal, and which he promised to refund if he did not recover in the present action, was a competent witness ?

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The fourth was merely as to the weight of testimony.

*Per Curiam*, delivered by LIVINGSTON, J.

1. The trespass having been committed in 1797, at a place *then* within the town of Saratoga, the plaintiff had a right to allege it was done in that town, according to the truth of the case, without regard to its subsequent division. The judge, therefore, properly overruled this objection.

2. It was not necessary to produce the plaintiff's letter of attorney to *Beriah Palmer*. The object of *Baldwin's* testimony, was to show, that *Jacobs* lived on a lot of the plaintiff, and acknowledged his right; that it was then regarded as the plaintiff's, taken care of as his, and possessed under him; whether this had been done under a power or not, was immaterial.—The ownership and possession of, or under him were the important facts to be established.

3. *Beriah Palmer* was a competent witness, notwithstanding the agreement he may have made to refund the monies he had received from other trespassers, in case the plaintiff failed in this suit.—Such monies must have been received for the plaintiff; and he only, and not the witness, would be affected by such refunding.

4. If the jury believed the plaintiff's witnesses, and we are to presume they did, the verdict is not against evidence, and ought not to be disturbed.

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*Jackson, on the demise of Williams and others, v.* \_\_\_\_\_  
*Chamberlin and others.*

RUSSEL moved for judgment, as in case of nonsuit, for not proceeding to trial. The affidavit stated, that issue was joined previous to June, 1802.

*Van Vechten* read an affidavit, setting forth that thirty-five cases were on the calendar, of which only thirteen were tried, but, from the length of those, and the criminal business before the court, the present action could not be heard.

*Per Curiam.* As many causes were tried, it is incumbent on the plaintiff to show that those issues were older than his. Let the defendant take the effects of his motion, unless the plaintiff stipulate and pay costs.

*David Deas v. Paschal N. Smith, President of the Columbian Insurance Company.*

ISSUE had been joined in this cause, in 1800, and two commissions had been sued out; one had been returned, but a long time having elapsed, the defendant gave notice, for the last term, that he would then move for judgment, as in case of nonsuit. On its being brought on, the plaintiff stipulated to try, at the next sittings, or circuit court, reserving to himself the right of applying to the court, for a renewal of the stipulation, in case the other commission, then pending, should not be returned.

## CASES OF PRACTICE

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*Benson* now renewed the application for judgment, on an affidavit, stating, that a few days after the above stipulation was entered into, the commission to which it alludes, arrived, and that the cause had been duly noticed for the last sittings, but had not been brought on.

*Woods*, contra, read an affidavit by the parties, on account of whom the plaintiff had effected the policy of insurance, on which the present action was brought. The affidavit stated the loss, exhibition of proofs, application for payment, refusal to pay, commencement of suits, suing out of commissions, and their return. That the interest was not fully proved by the witnesses examined under the last commission, as they were privy only to the lading of what was purchased by one of the witnesses, and covered by a former policy, but knew nothing of the residue ; that the cause was, nevertheless, noticed for trial, under an idea of proving interest in sundry other articles of the cargo by one *York Wilson*, who, though a seafaring man, the deponent believed to be permanently resident in *New-York*, as he had lived there for twelve months uninterruptedly, but had lately gone to the *East-Indies* ; the deponent first learnt this circumstance during the time of the last sittings, and his witness was not expected to return before the ensuing winter ; that being advised the testimony of *Wilson* was material, the defendant did not proceed to trial. But that he was advised, and believed, one *William Robinson*, shortly expected here, was a material witness for him, and that he believed he should be able to obtain *Robinson's* attendance at the next sittings in *New-York*, or the circuit thereafter ; that, as the deponent

was informed, and believed, the ground of defence, insisted on by the defendant, was the want of interest, and that the deponent understood, and believed, the defendant, or some person in his behalf, offered to return the premium, and pay costs, which offer the deponent refused to accept. That the deponent was informed and believed, the cause was one of the oldest on the calendar, but was, when called in its order, passed, for the accommodation of the defendant; that the deponent would have proceeded to trial, but for a notice to produce certain papers, which he was not prepared to do. These reasons, *Woods* argued, were sufficient to prevent the object of the motion; at least, if a nonsuit was ordered, it would be on condition of the defendant's abiding by his own proposal, and paying what was acknowledged to be due, the premium and costs of suit.

*Benson* offered a counter affidavit to show that *York Wilson* was a slave, and therefore the want of his testimony could never have prevented the cause from being heard, because, had he been present, his evidence could not have been received.

*Woods* contended, that counter affidavits were inadmissible, because, in the first place, a copy had never been furnished, and, in the next place, the practice was to exclude them, it being incumbent on the party moving, to support his application, on his original depositions.

*Benson* acknowledged the general proposition, but distinguished the present case by this circumstance; that the counter affidavit was not to support the mo-

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1803. tion, but to contradict a collateral and independent fact asserted by the plaintiff; and as to not being furnished with a copy, the plaintiff had not given a copy of his.

*Woods.* Copies of affidavits in exculpation, are never afforded, those to charge or demand, are.

*Per Curiam.* The application is for judgment, as in case of nonsuit: this is opposed by a deposition read by the plaintiff, disclosing facts, to rebut which, the defendant offers a counter affidavit: a question is made whether it can be received. On examining into the point, the court finds the practice to be settled against its reception. It is expressly decided, in *Grove* ad*s. Campbell, ante*, 115. "that a party can "never support his motion by any affidavits but those "on which he originally grounds it."

The motion must, therefore, depend on the first affidavits. From *that* by the plaintiff, among other things which it contains, it appears, that the commission mentioned in his stipulation, as the one then pending, was returned before the last circuit, and that he might have then gone to trial. His affidavit further states, that the return was examined, and the proof wanted, not contained in the answers to the interrogatories; that the interest required, did not appear; that there was a witness who resided in *New-York*, by whom it was expected to establish the same facts. This witness was not applied to, nor was any measure taken to procure his testimony till after the commencement of the court, and then he is found to be gone to the *East-Indies*. There is, however, an-

ther witness, who knows something material, but it is not stated what, nor that any measure is taken to procure his attendance. It is further stated, that this is one of the oldest issues; that it was called on and passed, for the accommodation of the defendant, though it is before sworn he did not proceed to trial, because the testimony of *York Wilson* was, as the plaintiff was advised by his counsel, material, and could not be had. The court are of opinion, the reasons are not sufficient. This is a second application for judgment: there has already been a stipulation, and *that* a special one. The want of a witness is alleged, and no diligence shown to procure him. There ought to have been immediate measures taken to subpoena him. It does not sufficiently appear that the cause was passed for the accommodation sworn to: it was necessary to have substantiated this; it rests on the single oath of the party; the counsel himself ought to have stated this. But though we should grant the nonsuit, we are requested to do this on condition. The affidavit, as to making the offer, is equivocal; and if, in any case, we would impose such terms, this is not one, for the plaintiff has not disclosed enough to show the proposition was ever made.

*Benson* pressed the court to reconsider the case determined in *October term, 1800,\** and weigh his distinction.

\* *Grove ad. Campbell.*

*Per Curiam.* We shall look into it, and if we see occasion to alter our opinion, the bar will be informed

Aug. Term, of it. In the mean time, judgment of nonsuit must  
1803. be entered.

N. B. The court never spoke to it again.

*The President and Directors of the Manhattan Company v. Ledyard & Ledyard.*

THIS case was submitted without argument.  
RADCLIFF, Justice, now delivered the opinion of the court.

This is an action by the plaintiffs, as indorsees of a promissory note made by *Brown, Talbot & Co.* to the defendants, for 488 dollars and 17 cents, and indorsed by them to the plaintiffs.

The declaration avers, that *James Brown, William Talbot, and John Goodere, acting under the firm of Brown, Talbot & Co.* made the note in question, the proper name and firm of *Brown Talbot & Co.* being thereunto subscribed ; and that the defendants being partners, under the firm of *Austin Ledyard & Co.* indorsed the said note in writing, the proper name and style of the said firm of *Austin Ledyard & Co.* being thereunto subscribed. The other parts of the declaration are in the usual form.

The partnerships of the makers and indorsees of the note, and the making and indorsing of the same, as above set forth, are admitted.

The evidence on the trial was, that *Brown*, one of the makers, subscribed the note by the partnership

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firm, and that *Austin Ledyard*, one of the firm of *Austin Ledyard & Co.* indorsed the same with the name of that firm. The question submitted by the parties is, whether the evidence supports the averments contained in the declaration.

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We have no doubt that the averments were sufficiently supported by this evidence. It was not necessary to set forth, that one of the partners of each of the firms, made and indorsed the note in the name or style of the respective partnerships. Although made and indorsed by one of the partners of each house, the legal effect was the same, and it is in all cases sufficient to set forth a writing according to its legal effect or operation. We are, therefore, of opinion, that the plaintiffs are entitled to judgment.

*John J. Arjo v. Joaquim Monteiro.*

BY THE COURT. If an alien defendant file his petition, &c. to remove the suit into the circuit court of the *United States*, at the time of filing special bail, he is in season, though the bail may have been excepted to.

*Jackson, on the demise of Hogeboom, v. John Stiles,  
Austin Griffin, tenant in possession.*

A TITLE to the premises in question had been awarded to the lessor of the plaintiff by the commissioners appointed to settle disputes to land, in the county of *Onondago*, and he had served declarations on the tenants, with the usual notices annexed. The declarations, however, contained blanks for the towns

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and counties, which, at the time of service, were not filled up, nor were they, in the copies annexed to the affidavits of service, and filed with them, on which the usual rule was entered. The declarations were served on the tenants within the three years allowed by law for prosecuting the titles awarded, but they were now elapsed.

*Spencer*, on these circumstances being disclosed by the affidavit of the plaintiff's lessor, stating also the services having been made with the full intent of carrying into effect the actions instituted, moved for a rule against the tenants, to show cause, by the first day of next term, why the declarations should not be respectively amended, by the insertion of the names of the towns and counties, and that fixing up the rule in the clerk's office, should be deemed good service.

*Emott*. Are the tenants to take notice of declarations which are mere nullities, void in themselves, and to which they are not parties? They have not appeared; they are not in court, and *John Stiles* is the only defendant to the suit, that can be known by the record.

*Per Curiam*. Notice having been served on the tenants, it was enough to put them on inquiry. There is time enough for them to come in if they please.—Take the effect of your motion.

*Cole v. Stafford.*

IN this cause the exoneration of bail, whose principal had been relieved under the insolvent law, was

opposed on the ground of the discharge not having Aug. Term,  
been duly stamped according to the act then in force. 1803.

*Per Curiam.* We cannot go into it; the act makes the discharge conclusive except in cases of fraud; the matter was before the court below, and they were the proper judges whether every thing was regular or not.

*Garrit Abeel v. Wolcott, who is impleaded with Van Norden.*

VAN VECHTEN, on behalf of the plaintiff, moved that the writ of inquiry, and proceedings stated in the affidavit on which he applied, should be set aside, and a writ of inquiry issue *de novo*. The affidavit set forth, that by an agreement in writing entered into between the attorneys of the parties, it was stipulated that on the execution of the writ of inquiry, every defence which could have been made, had a trial taken place, should be availed of; that both sides should have the same liberty of excepting to the admissibility of evidence, reduce their objections to writing and make a case in the same manner as if the cause had been heard at the circuit. That the evidence of each party having been gone through and closed, the attorney for the plaintiff went home, after which the jury called in the defendant *Wolcott's* attorney, and asked him if a verdict should go against *Wolcott*, whether he could recover his proportion against *Van Norden*? and whether, if it should be against the plaintiff, he could carry it before the supreme court? To the first of which questions, *Wolcott's* attorney

Aug. Term, <sup>1803.</sup> answered no; and to the latter, yes; in consequence of which a verdict was rendered against the plaintiff, but the writ has never been returned, but has been handed to the plaintiff's attorney, without any inquisition annexed.

*Per Curiam.* The application is to set aside a writ of inquiry, when there is none before the court. There is no return, no inquisition, and nothing to set aside. There was a written agreement, which does not appear to have been complied with. The plaintiff is in possession of his own writ of inquiry, and we see no objection to his issuing a new one, for as the writ is not before us, we cannot grant him the effect of his motion as to setting it aside.

*Jackson, on the demise of Finch and others, v. Johnnis Kough.*

DECLARATIONS had been served in these causes nearly six years ago.

*Van Vechten* moved to amend by inserting several demises from different lessors.

*Metcalf* opposed it on the ground that it might vary the tenant's defence.

*Van Vechten* observed, that in the *Warren-Bush* cases, the same thing had been done. If the defendant relinquish his defence, then all the costs heretofore incurred are to be paid; if he abide by it, then there is no injury done. The costs in the first case

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must be paid up to the day. This the plaintiff is willing to do, and accept any plea so that the cause might be brought on at the next circuit.

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*Per Curiam.* Amend on those terms.

*Wilhelmus Van Der Mark v. James Jackson, on the  
demise of Ostrander.*

**IN ERROR.** Judgment having been entered in the court of common pleas for the county of *Ulster*, on a verdict for the now defendants, the present plaintiff brought his writ of error returnable in this court. To this the clerk of the common pleas made his return in the manner said to have been usually practised in that county, by annexing a transcript of the record, and delivered it to the now plaintiff's attorney, who sent it back with directions to annex the original record. This was not done but the writ re-delivered to the plaintiff's attorney, with only the transcript returned.

The defendant, without any service of a *scire facias quare executionem non*, and without giving any rule to assign errors, *nonprossed* the plaintiff's writ, before it had been returned and filed, served him with a copy of a bill of costs, and sued out a writ of possession.

*Gardinier*, on affidavit of these facts, moved to set aside the judgment of *nonpros* for irregularity, and that if any writ of possession had been issued, a writ of re-restitution be awarded.

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*Per Curiam.* As the writ was never returned, this court was never in possession of the cause; whatever has been done here, must therefore be set aside.

\* See *Leith v. Mac Fer-*

*lan, 3 Burr.*

*1772. Account*

*v. Smith, 1*

*La. Raym.*

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*Beriah Phelps v. Trisdale Eddy.*

WOODWORTH, on an affidavit stating that issue had been joined in this cause in November, 1801, and noticed for trial at the last circuit for the county of *Columbia*, but not brought on, moved for judgment as in case of nonsuit.

*Williams* read a counter deposition acknowledging the notice, but adding that the attorney for the defendant did not attend; that his counsel, however, was there, with whose consent, an agreement was made between the agent for the defendant and the plaintiff's attorney, that the cause should not be brought on before the *Friday* in the second week of the circuit, on the *Thursday* next preceding which day, the court adjourned; that it was impossible to bring on the trial during the circuit, because, in consequence of the agreement entered into, the plaintiff had sent his witness home, and they were not to return till the *Friday* appointed.

*Per Curiam.* Let the defendant take nothing by his motion, and pay the plaintiff his costs for opposing.

*John Russel v. Jonathan Ball and others.*

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THE court ruled in this cause, that service on the agent of an attorney plaintiff, is as good as in any other suit, and that it need not be personal. Also that though unavoidable occurrences may prevent judgment, as in case of nonsuit, yet they will not, separately considered, excuse from payment of costs; for the misfortune of the plaintiff ought to be borne by himself, and not work a prejudice to the defendant.

*Robert Lyle v. Isaac Clason, and Isaac Clason v.  
Robert and John Lyle.*

THESE were cross-suits, brought under the following circumstances :

On the first of September, 1793, *Robert Lyle* engaged with *Clason* to go to *Europe* as his agent, and transact his business at a salary of 150*l.* per annum, *New-York* currency, besides his expenses. In consequence of this arrangement, *Robert Lyle* embarked on board a vessel of *Clason's*, called the *Hare*, destined to *Hamburgh*, with a cargo of sugar and coffee. In an account made out by *Robert Lyle* against *Clason*, he charges his salary for six months, at 42*l. 3s. 4d.* ending in *March*, 1794. No evidence appeared that *Clason* either then, or at any time after, discharged *Lyle* from his service; and in an account rendered by him to *Robert Lyle*, he gives *Lyle* credit for one year's salary at the above rate.

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In March, 1794, at which time *John Lyle* was employed in the Loan-Office of the *United States*, *Robert* was in *Paris*, and while there, entered into a contract with the *French* government, ostensibly in his own name, but in fact, for the house, and through the influence of *Delard, Swan and Co. of Paris*, for the delivery of from ten to fifteen hundred tons of pot and pearl-ashes, *in any port of France*, at 53*l.* sterling per ton, (payable as soon as delivered) two-fifths in bills on *Hamburg*, and three-fifths in *louis d'ors*, with a licence of exportation for the specie.

On the nineteenth of the same month, *Robert Lyle* wrote to *Clason* an account of the contract, urging him to embark in it, and inclosing a more particular letter from *Swan*, offering *Clason* an interest in the contract, by the terms of which the profits were to be thus divided : one-third to *Delard, Swan and Co.* and two-thirds to *Clason*, giving to *Lyle* for the use of his name, a fifth of the whole ; one-third of which, was to be paid by *Delard, Swan and Co.* the remaining two-thirds by *Clason*. *Robert Lyle*, in his letter, cautions *Clason* against being too explicit in what he may write, for fear of capture, and advises him to let the language he might use, accord with the appearance the business might be obliged to assume.

In consequence of this letter, and without any other information of the contract, than what the letter of *Robert Lyle* contained, *Clason*, in July, 1794, dispatched to *France*, under the command of one *Gideon Gardner*, a vessel named the *Joseph*, laden with pot and pearl-ashes, giving to *Gardner* at the same time, the following letter of instructions :

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" Capt. Gideon Gardner,

" New-York, 26th July, 1794.

" Dear Sir,

" You will please to take charge of the ship *Joseph*,  
" and proceed as fast as possible to *France*. I shall  
" not confine you to *any one port*, but by all means,  
" endeavour to get into *any port*, *the first that you*  
" *can make*, which, if you are fortunate enough in  
" arriving safe, you will immediately apply to one of  
" our *American Consuls* for instructions, respecting  
" the customs of the place, and there make sale of  
" your cargo to the best advantage for my account ;  
" *perhaps you will be able to make a sale of the whole*,  
" *to the republic of France*, at a good profit, by taking  
" part in brandy ; which, if so, and the brandy should  
" appear to you of a good quality, and at such a price  
" as you might judge would answer to bring here,  
" you will do it ; if not, you will endeavour to sell  
" for cash, and if times should appear favourable in  
" *England*, you will remit the greater part of your  
" avails to Messrs. *Bird, Savage and Bird*, mer-  
" chants in *London* ; and if you don't find freight from  
" *France*, or any other article that will answer, you  
" may run to any port in *England*, and either load  
" there with salt, or get freight, whichever you  
" may judge will be most to my interest. However,  
" it is impossible for me to give you any positive in-  
" structions, from the precariousness of the times ;  
" much will depend on your good judgment on your  
" arrival. I think *likely you may see or hear from Ro-*  
" *bert Lyle* ; if so, he will give you very essential as-

Aug. Term, "sistance in your negotiating your business in that  
1803. "country.

" I am, Sir, &c.  
 " (Signed) ISAAC CLASON."

*Gardner* set sail with the *Joseph*, and, on the 4th September, 1794, arrived at *Cherbourg*. From thence, he addressed himself to *Delard, Swan & Co.* and on the 9th of October, 1794, wrote them thus :

" *Cherbourg, 9th October, 1794.*

" *Messrs. Delard, Swan & Co.*

" *Gentlemen,*

" I received yours this morning, of the 15th *Vendémiaire.* I wrote you yesterday, and inclosed you " a receipt from the *garde Magazin* for my cargo. " The cost of my cargo, I sent you in my letter, " yours now mentions of receiving ; but, agreeable " to your request, you have it here inclosed.— " The pot and pearl-ashes, as per invoice, cost " £ 12,012 3 0 £ 12,012 3 0

" One barrel ashes delivered more  
 " than the invoice, which I received  
 " as a barrel of beef, average 350  
 " wt. at 46s.

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" *New-York currency, £12,020 4 0*  
 " *Charges here—paid charterage, 1000*  
 " *Do. weighing, 25*  
 ————— 1,025

" I know of no other charges here ; if any to be  
 " paid to the commission of commerce, you will  
 " please to charge them in the account. If you re-

" collect, you took off the foots of the invoice, when Aug. Term,  
" I was at *Paris*, on the letter I left with you. The \_\_\_\_\_  
" letter I wrote you about my owner you mention of  
" having found it, and say it was inclosed in yours I  
" received this morning, but I expect you omitted it,  
" as it has not come to hand. Please to forward it as  
" soon as possible, as it may make some alteration in  
" my affairs. You mention of the uncertainty of re-  
" ceiving cash or bills for any article from America.  
" I would thank you in your last to me, to mention  
" whether we may place full confidence in their pay-  
" ing me in good bills, or cash, **AGREEABLE TO THE**  
**" CONTRACT FOR THE QUANTITY OF ASHES SPECI-**  
**" FIED, AS THAT WAS MY PARTICULAR ORDERS**  
**" FROM Mr. CLASON.** You have once mentioned  
" it, but your two last letters leave it doubtful in my  
" mind. I would thank you to acquaint Mr. *Lyle* of  
" my proceedings as soon as the bills are obtained. I  
" am only waiting for the bills, and beg you to make  
" all dispatch in your power, and am yours.

" (Signed)      GIDEON GARDNER."

On the seventh of *December* following, *Gardner* addressed a letter to *Lyle* in these terms :

" *Cherbourg, 7th December, 1794.*  
" DEAR SIR,  
" I received yours of the 15th *November*. I ar-  
" rived here 4th *September*, and proceeded to  
" *Paris* and delivered the cargo ON THE CONTRACT  
" of 53; and as Mr. C. was in advance for the whole,  
" I arranged it for D. S. to have one-third, agreeable  
" to the account annexed. THEY ARE TO SETTLE

## CASES OF PRACTICE

Aug. Term, 1803. " WITH YOU FOR ONE-THIRD OF WHAT YOU ARE  
" ENTITLED TO, AND Mr. C. TO SETTLE WITH  
" YOU TWO-THIRDS, after delivering the cargo, and  
" the receipt presented for payment. There was a  
" suspension of all payments in bills or money. I re-  
" turned to *Paris*, and, after a long and tedious deten-  
" tion, I obtained bills on *Hamburgh*, though not at the  
" rate agreed for. They are at 90 days and the ex-  
" change 185 livres for 100 marks banco; which bills  
" I forwarded by post, to *Lubert and Dumas*, who, I  
" understood, did your business there. I was fear-  
" ful you were in *England* by what I had heard, or I  
" would have sent them to you. My orders to them  
" were, to negotiate the bills, and remit the money to  
" *B. S. & B. London*, on Mr. C's. account, except  
" there should be an appearance of war. In that case  
" they are to consult you. (*I was cautioned by Mr.*  
" *C. in respect to that.*) I presented a petition for  
" demurrage, &c. to the amount of £1250 sterl. which  
" has passed two or three offices, which I wish you to  
" press hard for. I sent two bills by different posts,  
" and wrote you. I have two-thirds of a cargo of  
" prize salt on freight; about £400 sterl. freight. It  
" is almost half on board, and am taking in the rest;  
" shall sail in a few days for *New-York*, and expect  
" to return as fast as possible with the remainder of  
" the contract. *Swan* is gone to *America*. Mr. C.  
" shipped by captain *S. Armour* about two hundred  
" tons—Major *Conolly* is the supercargo. They  
" have sold to individuals for specie. I have wrote  
" *B. S. & B.* since I sent the bills, and also informed  
" them of this other cargo.

## IN THE SUPREME COURT.

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<i>Account of my Cargo.</i>	<i>By Sales</i>	<i>Aug. Term, 1803.</i>
To the cost in America, as per invoice, 13,020 4 0	Of two hundred and sixty-one tons and 286 lb. at £53	
Insurance, 5 per cent. 601 0 2	per cwt. 13,840	
12,621 4 2		
Interest on do. from 1st July, to 1st <i>December</i> , at 6 pr. cent. 315 10 7	The amount of bills I remitted is, M. Banco, 158,786 10	
My Commission, 1,000		
Freight, 1,200 sterl. 2,133 6 8		
New-York currency, 16,070 1 5		
Is, sterl. 9,039 8 4		
3,200 7 10 — 4,800 11 8		
1,600 3 10		
13,840		
Paper money expen- ses on the cargo, was 2,795 livres, 2-3 1-3.		

In the month of *March*, 1801, *Robert Lyle* arrived in *New-York*. *Clason* refusing to pay the two-thirds of the fifth of the emoluments arising from the contract with the *French republic*, in *April*, 1801, *Robert* brought the present action against him. Shortly after which, *Clason* arrested *Robert* and *John Lyle* in the cross-suit, for a very considerable sum of money.

In *December*, 1801, both causes were, by order of court, referred.

On the 10th of *March* following, the attorney for *Robert Lyle* submitted the following proposition to the attorney of *Clason*.

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1805.

" As the suit instituted by Mr. *Clason* against Mr. *Lyle*, does not include any claim for damages, arising from the misconduct of the latter, and more particularly, for damages like those claimed on the business of the *Hare*, it would be proper (lest these should be made the subject of a future suit, on the part of Mr. *Clason*, on the ground of an objection to the report on the part of Mr. *Lyle*) that all claims and controversies of this nature be included in the submission already made, which, in a legal point of view, extends only to the subject matter in difference, in the particular suits referred.

" (Signed) THOS. L. OGDEN, for *Lyles.*"

To this the attorney of *Clason*, subjoined the following memorandum :

" It is understood that the demands for damages above mentioned, and all claims and demands on both sides, founded on contract, express or implied, are submitted." To this addition, the attorneys of both parties added their signatures, and the consent of the litigants themselves were given in these words, " We agree to the above, and that all the accounts, as already exhibited, shall be reported on by the referees in these causes.

(Signed)

" I. CLASON,  
" ROBT. LYLE."

On the 30th December, the deposition of *Gardner* was taken in behalf of *Clason*; in which, among other things, *Gardner* swore, that his letter of instruc-

tions contained the *only orders* he had from *Clason*; Aug. Term,  
that *Delard & Co.* informed him of *their* contract  
with the *French* government, and he contracted with  
them; that *they* informed him the contract was in  
*Lyle's* name, he being a neuter; that *they* informed  
him *Lyle* was to have a *gratification*, but what it was  
he, *Gardner*, *never knew*; thinking, and being fully  
assured in his own mind, that it would apply to the  
benefit of *Clason*, *Lyle* being his salaried agent, which  
consideration induced him, *Gardner*, to consent to  
*Clason's* being accountable to *Lyle* for two-thirds of  
the said gratification, which he expected would be  
paid by the salary at which *Lyle* was retained.

On the 22d of *June*, the referees made their report  
in both causes, and in each, reported in favour of the  
defendants.

On the 20th of *July*, the report in the cross-suit by  
*Clason*, was, on motion in court, duly confirmed. Im-  
mediately after which, on the 23d of the same month,  
*Robert Lyle*, in order to set aside the report in favour  
of *Clason*, made an affidavit, which stated, that the  
suit instituted by him in *April*, 1801, was to recover  
money had and received by *Clason* to the deponent's  
use; that it was referred, and at the meeting of the  
referees, the deponent, as the basis of his claim, did  
prove, and make appear, &c. (mentioning the con-  
tract and circumstances, and letters detailed in the  
beginning of the case) that the net profits on the sales  
made by *Gardner* under the contract, were £4,800  
11 8 sterling; that the fifth, to which the deponent  
was entitled, in pursuance of the engagements made

Aug. Term, with him, was £960 2 4, of which, by an original account of *Delard, Swan & Co.* produced to the referees, it was proved *Delard, Swan & Co.* had paid their one-third, according to the agreement with *Gardner*; but no payment was shown, or pretended to have been made of the other two-thirds of the fifth, nor was there before the referees, any set-off, or counter claim established against the defendant; that the deposition of *Gardner* (before shortly stated) was shown to the referees, and *Gardner* himself personally examined: that he then testified *he was, previously to his departure from America, with the said cargo, per the ship called the Joseph, made acquainted with the existence of the said contract, BY THE DEFENDANT, and with the terms or price therein stipulated;* that he did not consider himself bound by the instructions of *the defendant, to deliver his cargo under the contract*, nor restricted from doing so, but at liberty to act according to his discretion; that his motives for inquiring from *Delard & Co.* respecting the reliance to be placed on punctual payment, and also for alleging this to be done at the desire of the defendant, was to hold out the idea of future shipments, and *so insure the payment of what had been delivered, but not settled for;* that it was made to appear without any denial, that the defendant had only received his two-thirds of the profit on the contract aforesaid; that the report had, notwithstanding, been made in favour of the defendant, under an idea that *Gardner* had no authority to bind *Clason* to the payment of any thing to the deponent; and that *Clason* had altered the deposition of *Gardner*, after it was made, and before presented to the referees, without communicating the alteration to them.

On the 6th of *October*, 1802, *Clason* made an affidavit to vacate the report in favour of the *Lyles*, in which he set forth the instituting the two suits ; their being referred ; the reports made in favour of the respective defendants, and that they were duly filed, on the first day of *July* term last past, so that judgment would, according to the usual course of the court, be absolute, the then term ; that the reports, according to his information and belief, were drawn up by agreement between the counsel in both suits, that each should draw the report in favour of his own client ; that the deponent's attorney was, on the 23d of *July* last, served with a copy of an affidavit, accompanied with a notice of moving upon it to set aside the report in favour of the deponent ; that the matters contained in the affidavit, went to the merits of the case, respecting which, on account of sickness in the deponent's family, and absence from *New-York*, the deponent could not make any explanations to his counsel ; that he acquiesced in the report against himself, from a conviction nothing could be obtained from *Lyle*, and, therefore, no report could operate more favourably to the interest of the defendant ; that the known inability of *Lyle* to pay, was one reason why the referees were less particular in examining the deponent's claims against him, than they otherwise would have been, deeming it unimportant ; that the two reports were made, and intended by the referees as *set-offs the one against the other*, and to this end, they instructed counsel to prepare them accordingly ; that, among other charges against *Lyle*, the deponent gave in evidence, an account rendered by *Lyle*, in which he acknowledged having in his hands a balance of 244,246 livres in assignats,

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Aug. Term, amounting, at the then rate of exchange, to 4,477 dollars, and that assignats were then never kept on hand, but always converted into property, to avoid depreciation ; that since the account so rendered, the deponent never had any further money or mercantile transactions with the *Lyles*, and that *Lyle* neither accounted for, nor made any set-off against the said assignats, but the same were totally unaccounted for ; that the deponent, as soon as the sickness of his family permitted, consulted respecting measures to be taken about opposing the motion, to set aside the report in his favour, but there was not time enough left in the term to do it ; that but for the application of *Lyle* to set aside the report in favour of the defendant, he should never have applied to set aside that in favour of *Lyle*, for the insolvency of *Lyle* made it of no consequence.

The notice of motion with which this affidavit was accompanied, was repeated on the 7th of *January*, 1803.

To oppose this, *Robert Lyle* made, on the 14th of *January*, 1803, an affidavit, stating, that he, and his brother *John*, the other defendant, acted, in the year 1795, as agents for *Clason*, in which capacity they had received various large sums of money, the whole of which had been faithfully accounted for ; that the suit against *Clason* was for money due individually to the defendant, on another concern, and for damages for libellous letters and slanders published against him by *Clason* ; that he and his brother were arrested, as before mentioned, and the two causes referred ; that in the suit against the deponent and his brother, (the

declaration on which was for goods sold with the usual money counts only) *Clason* produced an account with charges, against the deponent and his brother, for breach of orders and neglect of duty, to a very large amount; that on asking for some evidence, by which it might appear, those charges were included in the submission, the agreement of the 10th *March*, 1802, was produced; that the same was intended merely to extend the powers of the referees to claims of the nature of those mentioned in, and warranted by, the declarations to which the deponent had confined himself; that his, and his brother's faithful agency, and due accounting for all sums of money, were fully proved; that in the cross-suit against the deponent and his brother, the referees made their report on a conviction nothing was due to *Clason*, and not from any regard to the deponent's insolvency or circumstances, as he was, by the referees themselves, personally informed; that the deponent proved, to the satisfaction of the referees, that the value of the assignats mentioned in *Clason*'s affidavit, was, *at the time specified*, only £278 2 9, and *not* £4,477; that they were *not* then usually converted into property, but held by many persons in hopes of their rising, and that the said assignats *were not only not made use of by the deponent, or kept in his hands, BUT HAD, FROM THE TIME OF THEIR FIRST RECEPTION, BEEN PAID OVER BY HIM TO THE CORRESPONDENTS OF CLASON, LUBBERT, FRERES & ELIS, OF BORDEAUX, BY WHOM THEY WERE CONVERTED INTO SPECIE, FOR THE USE OF CLASON, AND ACCOUNTED FOR WITH GARDNER, WHEN ACTING AS CLASON'S AGENT*; that, so far from the acquiescence of

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Clason in the report against him, for the reasons he had assigned, he had, after it was made, purchased protested bills, on which the deponent's name was as an indorser, and had commenced suits against the deponent upon them, in order, as he believed, to create a set-off against the verdict the deponent might ultimately obtain.

After some struggle by Hamilton, on the part of Lyle, to discriminate the two suits, the court was pleased to order the arguments to set aside the several reports to come on together.

Hamilton, for Lyle, after stating the circumstances, and commenting on them, and the affidavits of Clason and Gardner, observed, that it was very singular Gardner, without any knowledge of the contract of Delard, Swan & Co. with the French republic, or of Lyle's intent, should deliver exactly under that contract, and write a letter acknowledging the very interest Lyle claimed under it, and that Clason should pay him what he was thus entitled to. Gardner, without knowing the contract, goes further; he asks Delard & Co. if the French government will be punctual in paying, and this, he adds, Clason desired him to inquire about. Clason too, ratifies the engagement of Delard & Co. and Gardner, with Lyle, by adjusting the account with Delard & Co. and receiving under that account the two-thirds, by the very express terms of it, charged with the payment of the two-thirds of Lyle's fifth. To argue on the assertions of Gardner, would be really superfluous. The referees must have thought Gardner had no right to bind Clason. This idea is clearly repugnant

to every principle of law. He that entrusts another with general powers, must abide the result of his agent's conduct. Therefore, though the report in favour of *Lyle*, may and ought to stand, that in favour of *Clason* ought to be set aside.

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*Hopkins* and *Troup*, contra. In making the reports in these causes, the referees were actuated by a wish to make the parties even, and leave them just as they were found. For this purpose, the report in our cause, was intended as a set-off to the other, and to effect this object, counsel were desired to frame the reports in such a manner as might best obtain the desired end. The various facts appear in the affidavits before the court ; but it is material to state, that the party who first made the application to disturb these reports, has not presented any original agreement, on which his suit is founded. *Delard, Swan & Co.* made a contract with the *French* government, for a certain quantity of pot and pearl-ashes : as these articles enter into the composition of gunpowder, it was necessary to have a neutral name in the business. It is difficult to say, what ought to be the true relative compensation for the protection a neutral character would afford ; but it is to be observed, that *Delard & Co.* were the real contractors ; *Lyle* a mere *nominis umbra* : for this, however, he says he is to have one full fifth, one-third of it to be paid by *Delard, Swan & Co.* the other two-thirds by *Clason*.— These terms, it is alleged, were stipulated by a formal contract, yet this contract, which *Lyle* must have had, is never produced ; on the contrary, instead of relying upon it, he rests on a letter received from *Gardner*. In addition to the inference to be

Aug. Term, drawn from this fact, it appears, that at the very time when this pretended contract was made, *Lyle* was in *Europe*, under an annual allowance from *Clason*, and actually his salaried agent, receiving wages for every service performed. A doubt has been entertained, how far the court can, under the existing circumstances, with propriety set aside the report in favour of *Clason*: but, surely, whenever they clearly perceive that the referees have proceeded on a mistake, either of law or fact, this tribunal will always interfere. If the court will set aside an award, they will, on the same principles, vacate a report; and, whatever argument will induce them to do it in one of the now causes, will have equal force in the other; for if the referees have been mistaken in their endeavours to create mutual set-offs, both reports will be set aside; or, on the other hand, if they have acted properly, both will be confirmed; for the court will not, unnecessarily, do away what the referees have done. In making their determination, they considered that the power to sell, and the power to give away profits, were two things: to this latter, it cannot be contended, that the authority of an agent or a factor can extend. There is no question about an agent's right over the property passed to him, but he cannot enter into collateral engagements: he may sell and warrant a title; but not give away the property. If he may, in any degree, do this, he may go on indefinitely, and make away with the whole. He may go on making contracts ruinous to his employer, and contrary to the purposes of his delegation. Under a power to sell, if he should be allowed even to exchange, can he be authorised to pay a difference? The boundary of his power to bind, must

be connected with that of his authority to sell; it must Aug. Term,  
be confined to that, and will not warrant him to give 1803.  
away profits ; to pay another sum of money on  
another account than that of the sale. The point  
turns on whether *Gardner* had a competent authority  
to bind *Clason*, to pay two-thirds of a fifth of the pro-  
fits. It was derived from the letter of instructions.  
That letter delegates only a general power. From the  
exercise of such a power, the claim cannot be sup-  
posed. That a factor may sell by a broker, and give  
a commission, if customary, is not contested ; but  
it is contested, that a factor or agent, having only a  
general authority to sell, can give away a substan-  
tive part of the merchandize when it was sold ; that  
he can do so, there is not a *dictum* in the books. It  
would be, in fact, to enable him to dispose of a por-  
tion of the property he is entrusted to vend. It would  
give rise to the most serious consequences ; a frau-  
dulent collusion would completely destroy the inter-  
ests of the principal, by enabling to constitute a sale  
regular in its form, the precise mode of which, could  
not be easily foreseen. The intention of *Clason's*  
agent must be taken into consideration, and the mo-  
tives on which he proceeded, permitted to explain  
how he meant to bind his principal. *Gardner* never  
knew what the gratification to be paid *Lyle* actually  
was. The inducement he had to consent to any, was,  
that he deemed the amount immaterial ; for as *Lyle*  
was in the service of *Clason*, at a fixed salary, *Gard-  
ner* naturally concluded all *Lyle's* labour would ac-  
crue to *Clason*. On the principles of natural justice,  
the demand cannot be substantiated. He lends his  
name to *Delard*, it being necessary to make use of a

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1803. neuter. The *douceur* must certainly be according to the situation of the party. The letter to *Clason*, containing the terms of the contract, does not state the sum to be paid. It is obvious, therefore, that this was never intended. It was considered as too trifling to specify.

*Gardner* knew, when he left *America*, that *Lyle* was a salaried agent. This is not a case of good faith between an agent, and a person totally a stranger, and, therefore, the principal called on to pay ; but we are called upon, on the strength of a little memorandum touched into the foot of an account. It is not to be forgotten that the referees were merchants, and well knew the course of trade and business, when the transactions took place, as well as the rights of an agent at a fixed annual allowance. The claim too, goes by the express name of a gratification ; and who ever heard of a partnership share (which this in fact is) ever being known by the appellation of a gratification ? When was 600*l.* sterling ever considered as a gratification for a person at a salary of 150*l.* per annum, *New-York* currency ? The referees might, therefore, have justly ejected the claim. No inference can be drawn from *Gardner's* letter, speaking of a contract : he might have sailed on another. But it was not the mere matter of the contract that was referred ; subsequent matters were added, not included in the two causes : this was by agreement of the parties, and how can the court say the full claim on the contract has not been allowed, when it might have been counterbalanced by damages and misconduct in the matter of the *Hare* ? This, therefore, being an application to the equitable jurisdiction of the

court, they will so mould and blend the two causes Aug. Term,  
as will best answer the ends of justice; and, if in the  
1803.  
suit by *Lyle*, the report be set aside, the court will  
do it on terms, and vacate the report in that against  
him.

*Clason* declares he never heard what *Lyle's* com-  
pensation was, till after the suit was brought. But  
can the court say, this particular claim ought not to  
be disallowed? After the rules to refer, other matters  
were added and blended; all contracts, "*express or*  
"*implied,*" were submitted. It cannot be said, there  
were not other claims to extinguish this demand of  
two-thirds of the fifth. It might have been admitted,  
and liquidated by a counter claim. Referees and ar-  
bitrators may so consider the subject matter before  
them, as will best answer the ends of justice: they  
may take into view matters both of law and of fact;  
perform the offices of judges and jurors, and are en-  
titled to found their decision either on law, or princi-  
ples of general equity. The whole of this was dele-  
gated to them, and they have determined, on a view  
of all matters in controversy blended together in one  
mass, all the objects in these two causes, even in that  
against both the *Lyles*, as consolidated before them.  
Whether they have been perfectly accurate in thus  
beholding them, is immaterial, if they did so consi-  
der them, have acted under that idea, and have attain-  
ed the real ends of justice, though, perhaps, by ex-  
traordinary means. It was evidently the wish of the  
parties to set all controversies between them fully at  
rest, and this has been accomplished. The court,  
therefore, will never say, that one report shall be con-  
firmed, and the other set aside. The consideration

Aug. Term, 1803. of the report in the suit by *Clason*, might have influenced in the making up *that*, in the action against him. That it did so, is evident, because the reports were intended as mutual set-offs. Whether this could be supported on strict legal reasoning, had been doubted: but the spirit of the case in 8 *D. & E.* might, perhaps, fully warrant the conduct of the referees. It may be a question, also, how far *Gardner* could give such an interest, as might, perhaps, create a partnership between *Lyle* and *Clason*.

*Harrison* and *Hamilton*, in reply. If, in cases of full and fair investigation before juries, this court will interpose, when a verdict has been rendered on an evident mistake of the law, they certainly will do so in the case of a report made by referees, however appointed. That this reasoning applies to the suit of *Lyle v. Clason* is manifest, and it will, therefore, be sent for further examination. With respect to the contract made between *Lyle*, and *Gardner*, the agent of *Clason*, it is for the court to determine whether it be obligatory or not. The affidavits on the part of *Clason*, do not state that he was ignorant of the contract with the *French* government, but of the claim of *Lyle*. It appears from *Lyle's* deposition, and is not controverted, that in *March*, 1794, letters were written by *Lyle* and *Swan*, informing *Clason* of the contract; of *Lyle's* right, and that he (*Clason*) might share, if he thought proper. The letters were produced, and that they were received, *Clason's* conscience would not let him negative. There was a stipulation to compensate, with a share of the actual profits, for the use of the neutral name of *Lyle*; when these profits were ascertained, the right of *Lyle* at-

tached. There is, to be sure, no express recognition by *Clason* of the contract, but in the *September* following the date of *Lyle's* letter, *Gardner* arrives in *France* with exactly such a cargo as the contract demanded. Are there not circumstances enough, to think he went there for the purpose of acting under it? But even allowing there are not, does not the letter of instructions substitute *Gardner* as owner of the property he carried, and invest him with all *Clason's* power over it? He is to exercise his judgment; do his best; sell for *French* brandy; sell to the *French* government, &c. he had, therefore, a right to make any contract under the words of the letter. He arrives in *France* with a power to dispose; he finds *Delard* possessed of a contract, in the name of *Lyle*, under which, the power to dispose may be exercised with great advantage. He does exercise it, receives the emolument, settles with *Delard & Co.* but refuses to do so with us. The inquiry then is, had *Gardner* a power, and has he exercised it? That he had and has, no doubt can be entertained; and as little, that it was under our contract; for the affidavit subsequently made by *Gardner*, does not deny, but admits the fact. He says, however, that he knew not what the gratification was: this is extraordinary: he seems to have forgotten his own letter after a very few months; and though that does not specify the exact sum, the two-thirds for which he mentions *Clason* is to settle, it affords an internal evidence that he did know it, much stronger than his own assertion to the contrary. *Gardner's* letter of the 7th *December*, 1794, particularizes two-thirds, and gives an account of the sales. Allowing, however, *Gardner* not to be apprised of the

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exact sum, as *Lyle's* right was ascertained and perfected under the contract to which *Gardner* consented, acceding to the payment of two-thirds by *Clason*, it follows *Clason* must be bound. The rule is, that he who places confidence, shall suffer by the abuse of that confidence; *Clason*, therefore, and not *Lyle*, is to be the loser by *Gardner's* actions. It is extraordinary that *Clason* should have remained ignorant of the amount of *Lyle's* claim, four years after *Gardner's* return and rendering an account of his transactions. If *Gardner* then, having an authority to bind *Clason*, did so, and *Clason* has received the benefit of that transaction, *Lyle's* right is perfect. The assertion of his being a salaried agent, does not affect the claim. His time of service expired in September. Beyond that, *Clason* himself, allows no salary, and *Gardner's* letter is dated in December. *Gardner* himself acknowledges *Lyle's* right, by telling *Delard* to pay one-third of it. Had it been otherwise, *Gardner* would have said, you are not to pay the third of the fifth to *Lyle*, but to *Clason*, for whose benefit *Lyle* is acting. There is a further proof in the letter to *Lyle*. *Gardner* there says, "Mr. *Clason* is to settle with you for two-thirds." Here then is a clear established right in *Lyle* to receive from *Clason*, two-thirds of the fifth of the whole profits. If so, the arbitrators have been guilty of a mistake, in point of law, in considering *Gardner* unauthorised to bind *Clason*, and this the court will assuredly set right. There is also another ground on which they have clearly erred; for if they have blended the reports in the two causes, or made one enter into the composition of the other, they are manifestly wrong. There is no evidence of any thing

against *Lyle's* right, but the demands in the cause Aug. Term,  
against him and his brother. Though both causes  
were referred, the referees have not any right to blend  
matter extraneous to the respective suit. *Robert*  
*Lyle's* action is for his own separate account. That  
of *Clason* against *Robert* and *John Lyle*, is against the  
partnership, and the one cannot be set off against the  
other, being in different rights. This is very wide  
from the case of a surviving partner, where the rights  
and duties centre in one person. The agreement  
does not alter this, for it was merely to allow of such  
matters as were admissible against the same parties,  
though not specifically proceeded for; to settle all dis-  
putes for which actions might be instituted against  
the respective defendants; to allow of damages aris-  
ing from breach of contracts, express or implied, by  
the *Lyles*, to be settled under the reference of the suit  
against them, in which counts were used not applica-  
ble to actions of damages, but never to permit one  
suit to be set off against the other, or make *Robert*  
*Lyle* give up the benefit of his claim against *Clason*.  
They did not even take it into consideration, as they  
considered it not due; the report, therefore, in favour  
of *Robert* and *John Lyle*, may well be suffered to re-  
main, and that in favour of *Clason* be set aside; for  
the amount of the profits claimed from him not being  
taken into consideration in the accounts by the ref-  
erees, now remain unsettled. If, therefore, without  
including this demand, *Clason* has not any demand  
against *Robert* and *John Lyle*, the report does not  
prevent *Robert* from having a demand against *Clason*.  
Besides, it is evident the contract must have been  
known to *Clason* and *Gardner*, by the latter's express-

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ing an intention of returning with the residue. The not mentioning it in the letter of instructions, was to avoid the risk of capture and condemnation; fates that were sure to attend a cargo of a contraband nature, going under an avowed contract with the *French* government. The receipt by *Clason*, of the proceeds of the cargo, is a ratification of every contract under which it was made, and no disavowal of *Gardner's* authority can be permitted. *Clason* enjoys the benefit, and if any charges do accompany the agreement, it is to be taken *cum onere*. The allowance of the account by *Delard, Swan, & Co.* is conclusive on the terms.

Lewis, C. J. delivered the judgment of the court. These actions were referred under rules of court to three referees, who have reported in each against the respective plaintiffs, declaring nothing due on either side. Motions are now made to set aside the several awards.

In the first cause, in which *Lyle* is plaintiff, the application is founded on a presumption that the referees have been mistaken in point of law. That they have either rejected a contract entered into by the defendant's ship-master and consignee, as not obligatory on his principal, or have set off the balances found for the plaintiffs, in the respective causes against each other.

To this the defendant answers, that he was not bound by the engagement of his ship-master, who was also his consignee, and that if the referees have

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made such off-set, they were justified on principles of Aug. Term,  
law, and by an agreement entered into between the \_\_\_\_\_  
respective attorneys.

As far as the facts can be collected from affidavits and documents furnished the court, they are these : That the *Lyles* being engaged in business in *France*, were charged with some commercial concerns of *Clason*, on which he claims a balance of account, and on which they deny any thing to be due. That *Robert Lyle*, while in *France*, was employed by the house of *Delard, Swan & Co.* there established in business to negotiate a contract, for the supply of certain quantities of pot and pearl-ashes to the *French* government, which he effected, and for which they were to allow him one-fifth of the profits. That the company, as well as *Robert Lyle*, wrote to Mr. *Clason* in *March*, 1794, acquainting him with their contract, and proposing to him to make shipments thereon. That in *September*, a vessel called the *Joseph*, belonging to the plaintiff, arrived in *France* loaded with ashes, consigned to *Gideon Gardner*, the master, who had general instructions to sell to the government, or to individuals, at his election. That *Gardner*, after making inquiries as to the government's punctuality, agrees with *Delard, Swan & Co.* to turn in his cargo under their contract, which is accordingly done, and neat a profit of £6,800 11 8 sterling ; whereof *Clason* received two-thirds in consideration of his having made the advances, and the house of *Delard, Swan & Co.* one-third. On the adjustment of this account, it appears that the company and *Clason* were to account to *Robert Lyle* for his one-fifth, according

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1803. to the proportions of profits by them respectively received.

Captain *Gardner's* powers being discretionary, he was perfectly justifiable in making the disposition he did of the cargo entrusted to him, and even if he was not, it does not appear that Mr. *Clason* ever denied that transaction his sanction, but that on the contrary, he has received by remittances to *Bird, Savage & Bird*, of *London*, the proceeds of the cargo, including his proportion of the profits. Under these circumstances, there can be no doubt that Captain *Gardner*, having turned in his cargo under the contract, bound Mr. *Clason* to the fulfilment of the terms of that contract; and the latter, having received the full two-thirds of the profits of the adventure, under the stipulation made by his agent, that he should account to *Lyle* for two-thirds of his *douceur*, or whatever else it may be called, (for names will not alter the essential quality of the thing) he is bound to perform such stipulation.

If, therefore, the referees have not admitted this claim, they have erred as to the law, and the award ought to be set aside.

If, on the contrary, they have admitted it, then they must have allowed a balance found due to *Clason* in the other suit, as a set-off against it. This also is incorrect; for the suits are not between the same parties, and the partnership funds should have been first appropriated to the discharge of the partnership debts. The agreement between the attorneys, does not authorise such set-off. Its only object, is the ad-

mission of certain demands which would not fall <sup>Aug. Term,  
1803.</sup> within any of the counts in the respective declarations, \_\_\_\_\_ in order to avoid further litigation.

The award, therefore, in each suit, ought, in my opinion, to be set aside. The one against *Clason*, for the reasons above mentioned, and the one in which he is plaintiff, because there is a probability that the referees found a balance there due to him, which he would otherwise lose the benefit of. The judgment of the court is, that both awards be set aside.

*Robert M. Brett and John Bunn v. Mathew Hood.*

THE plaintiffs had in the last term recovered a verdict against the defendant, who, on making a case, had obtained the usual certificate to stay proceedings; to set aside which, the plaintiffs gave notice of a motion, but not attending to argue it,

*Caines*, for the defendant, on the last day of term, applied for costs, which the court was pleased to order.

N. B. It was during this term intimated by the bench, that they would not hear any argument to set aside a judge's certificate to stay proceedings on a case made.

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*Rathbone v. Blackford.*

THE service of a notice in this cause, was stated in the affidavit to have been on a person in the office of the attorney.

*Per Curiam.* It is not sufficient. There does not appear to be any relation between the party served and the attorney. The notice might have been given to a mere stranger. A connection ought, therefore, to have been stated, so that the court might be convinced of a privity between the party to whom the notice is delivered, and the attorney on whom it is meant to take effect.

*Parkman v. Sherman.*

IN this cause the court determined, that when both notice and affidavit are wrong titled by reversing the parties and putting the defendant in the place of the plaintiff, the error is fatal; and this case was distinguished from that of *Ryers v. Hillyer*,\* because there, though the parties were reversed in the title of the notice, yet in that of the affidavit they were rightly named: so that, independent of the object of the notice in *that* suit, there was a proper title to rectify the mistake, but in this, where in every paper the action was, as if by the defendant against the plaintiff, there was not any thing by which the mistake could be cleared up, and the notice might, therefore, be in a cross-suit, where the parties actually were reversed.

*John Mitward v. Richard S. Hallett.*

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THE plaintiff had recovered a verdict against the defendant, on whose part a case had been made, and a copy served on the attorney of the plaintiff. Many inaccuracies being observed in it, a full statement was drawn up on the part of the plaintiff, and served on the defendant's attorney, who, on receipt of it, objected to the informality of thus making a new case. The usual time for objecting to the amendments having elapsed, the attorney of the plaintiff gave notice of argument, set the cause down for hearing, and served copies of the cases he had drawn up.

*Caines*, on an affidavit, to which was annexed a copy of the altered case, made on the part of the plaintiff, and also a copy of the service of notice, moved to bring on the argument, or that the plaintiff have leave to enter up his judgment.

*Benson*, contra, resisted the application, contending that the case now before the court was a new, and not an amended case. That the rule allowing amendments to be proposed, did not authorise making an entire new case, like that on which it was wished to proceed.

*Caines*, in reply, hoped the court would not hearken to a distinction which really did not seem to have any solidity. Every case differing from that first served, was, in fact, an altered, or amended case. The objection resolved itself into this, that every amendment must be written on the same piece of pa-

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per which held the case served. If so, close lines, narrow margins, and great omissions, would render every case superior to amendment, and totally exclude all, that the party who made it, might please to reject. It was, however, conceived, every variation noticed, though on a separate piece of paper, was as much an amendment, as if the diversity had been marked on the paper containing the case originally made.

*Per Curiam.* Every amendment must be on the case made, or refer to the line and page in which it is proposed to be inserted. This, not because it is less an amendment when written on a separate piece of paper, but in order to inform the judge before whom the cause was tried, where to direct his attention, in case the facts should be disputed, and not reduce him to the necessity of reading over and comparing two cases: the plaintiff can take nothing by his motion.

*Nichol and Thomson v. The Columbian Insurance Company of New-York.*

EMOTT moved for a second commission in this cause, to re-examine the same witnesses to a particular fact disclosed, and from which, as the answers then stood, it might be supposed a deviation had been made, to which point the former investigation was not directed.

*Benson*, contra. It is now too late; there was never an instance of a second commission to examine the same witnesses. The answer shows the defence

that arises on the return, and this is an attempt to do Aug. Term,  
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*Emott*, in reply. The application may be novel, but it is not unreasonable. Suppose the witness had been examined in court, and had testified to a certain fact, which, taken without any explanation, would have one effect, if explained, another, might not a question be asked to explain ? especially when it comes out collaterally. Here the deviation was not the object of inquiry. The question was simply to and from what places were you bound ? There may be an apparent, though not a real deviation ; for there might be a custom to go that rout.

*Per Curiam.* Take your commission. The answer being directed to another point, may be explained by an interrogatory to the one which it discloses ; for it may assign very sufficient reasons for the *iter* adopted. The commission, however, must be at the peril of the party.

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## NOVEMBER TERM, 1803.

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*The President, Directors and Company of the Union Turnpike Road v. Thomas Jenkins.*

*The same v. the same, in three other actions.*

• • Ch. 118. BY an act of the 3d of April, 1801,\* certain persons were incorporated, for the purpose of improving the road from New-Lebanon to Hudson, under the name of "The President, Directors, and Company of the Union Turnpike Road."

By the second section of the act, it is ordered, "that Robert Jenkins, and Elisha Williams be, and "they are hereby appointed commissioners, to do "and perform the several duties hereafter mentioned : that is to say, they shall, on or before the first "day of May next, procure two books, and in each "of them enter as follows : *We, whose names are* "hereunto subscribed, do, for ourselves, and our legal "representatives, promise to pay, to the President, "Directors, and Company of the Union Turnpike "Road, twenty-five dollars, for every share of stock "in the said company, set opposite to our respective "names, in such manner and proportion as shall be determined by the said President, Directors, and "Company ; and every subscriber shall, at the time "of subscribing, pay unto either of the said commissioners, the sum of ten dollars, for each share "so subscribed ; and the said commissioners, shall,

"as soon as one thousand shares have been subscr-  
"ed, cause an advertisement to be inserted in the  
"public *news-paper*, printed in *Hudson*, giving at  
"least ten days notice of the time and place the said  
"subscribers shall meet, for the purpose of choos-  
"ing five directors, who shall be stock-holders, for  
"the purpose of managing the concerns of the said  
"*Company*, for one year; and the day of choosing  
"the said directors, shall, thereafter, be the anniver-  
"sary day of choosing directors; and the directors  
"elected by the votes of the stockholders, shall im-  
"mediately proceed to the choice of one of their  
"members for *President*; and the said *President and*  
"*Directors* shall and may meet from time to time,  
"at such time and place as they may by their bye-  
"laws direct, and shall have power to make such  
"bye-laws, rules, orders and regulations, not incon-  
"sistent with the constitution of this or the *United*  
"*States*, as shall be necessary for the well ordering  
"of the affairs of the said corporation: PROVIDED,  
"that, at the election of the directors, every person  
"shall have a number of votes equal to the number  
"of shares owned by such person, if such number  
"shall not exceed fifty, and one vote for every three  
"shares owned by such person exceeding fifty."

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By the last section, it is enacted, "That it shall  
"be lawful for the said directors, to call for, and de-  
"mand, of and from the stockholders respectively,  
"all such sums of money by them subscribed, or to  
"be subscribed, at such times and in such propor-  
"tions, as they shall see fit, under pain of forfeiture  
"of their shares, and of all previous payments made

Nov. Term, 1803. " thereon, to the said *President, Directors and Company.*"

The defendant had subscribed for 280 shares, but, at the period of writing his name in the book, as directed by the first section, the 10 dollars therein ordained to be, at that time paid, were neither so paid, nor were demanded. Two orders for paying in 5 dollars on each share subscribed, were made, with which the defendant refused to comply, and for their amount the present actions were brought. The first count in the declaration, stated the passing of the act, and incorporating the company. It also set forth the second section, omitting, however, that part requiring the payment of the 10 dollars on each share at the time of subscription ; it went on averring the compliance with the requisites of that section, the subscription of the defendant, and of 2,900 shares ; it stated the election of a *President and Directors*, and two orders made by them for payment of two instalments, of 5 dollars cash, on each share subscribed, notice, and by reason whereof, &c.

The second count was in these words, " And whereas, also, the said *Thomas Jenkins*, on the seventh day of *April*, 1801, at the city of *Albany*, in the county of *Albany*, made his certain promissory note in writing, by him, in his own proper hand, writing subscribed, the date whereof, is on the same day and year aforesaid ; whereby the said *Thomas*, promised for himself, and his legal representatives, to pay to the *President, Directors and Company of the Union Turnpike Road*, the sum of 25 dollars for every share of stock set opposite to

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" his name, in such manner and proportion, and at Nov. Term,  
" such time and place, as should be determined by \_\_\_\_\_  
" the said *President, Directors and Company*, and  
" the said *Thomas* did then and there set opposite to  
" his name, fifty shares," with an averment of their  
determining that he should pay 5 dollars on each, on  
the 10th of *September*, then next, with notice, liability,  
and assumption.

The third count was in the same form on a pro-  
missory note, for 230 shares.

The causes were tried at the *Albany* circuit, in  
January last, and general verdicts found for the plain-  
tiffs.

After this, the defendant gave notice of moving in  
arrest of judgment, and assigned the following rea-  
sons :

1st. That the first counts in the declarations in  
the said causes, being founded upon the statute, do  
not set forth that the said defendant *at the time* of sub-  
scribing the said subscription, paid to the said com-  
missioners, the 10 dollars on each share, by him sub-  
scribed, according to the regulations of the said act,  
and that it appears by the said counts, that the com-  
missioners therein named, did not, as soon as one  
thousand shares were subscribed, in the manner di-  
rected by the said act, proceed to give the notice by  
the said act required, for the purpose of choosing di-  
rectors, and that no order and determination of the  
*President, Directors and Company*, in the said decla-  
rations mentioned, is stated in the said first counts;

Nov. Term, 1803. for the payment of any money, upon the shares of stock, therein mentioned to have been subscribed; so that the defendant never became liable to pay any such money, and that the promises in the said first counts stated, are void for want of consideration.

2dly. That the second and third counts, in the declarations in the said causes, are founded on agreements or promises in writing between the parties, as on a note of hand, which is not within the statute, &c. and that the said counts do not set forth any good or valid consideration, upon which the said agreements in writing were made and given.

Immediately after service of notice of the above reasons, in arrest of judgment, on an affidavit stating, that the evidence offered at the trial, was under the first counts in the declarations, and calculated to support them in particular (the second and third counts not being read to the jury, nor referred to by the counsel) the plaintiffs gave notice of a motion, to amend the verdicts in the several suits, from the judge's notes, so as to make them apply only to the first counts in the several declarations, and to enter verdicts on the second and third counts for the defendant, and to amend the *postea* and rules for judgment entered thereon, in conformity to such order as the court might make.

*Champlin*, for the defendant. The first objection is, that the ten dollars, ordered by the act to be paid, was not so done. The contract then, on which the action is founded, is not according to the order of the statute. In the next place, the orders stated by the

declaration to have been made for payment of the Nov. Term,  
sums demanded, are not in pursuance of the law. By \_\_\_\_\_  
that, the order is to be by the *President, Directors  
and Company*; the declaration sets forth one, by  
the *President and Directors* only. This is fatal, for  
as the plaintiffs have a particular authority, they  
ought to show a strict literal compliance with the  
law, by which they are authorised. If they have a  
right to omit the company in their orders, they may  
the directors, and so the president alone may govern  
the affairs of the corporation. The two last counts  
are plainly bad: they are on promissory notes, un-  
der the statute, where those notes appear to depend  
on a contingency. The declarations, therefore, on  
them cannot be maintained. *Carlos v. Pancourt*, 5  
*D. & E.* 482. For a note on a contingency is not a  
note within the statute. Not that such a note can-  
not be declared on, but then it must be as a special  
agreement, and the consideration set out. As to the  
notice to amend, it is before the court; they, per-  
haps, will not be disposed to allow it. We object,  
however, that the application is too late, because a  
term has intervened, and the evidence which was giv-  
en in one count, would equally apply to all. Yet, if  
we are wrong in this, if the court should give leave to  
amend, they will not do it, without ordering at the  
same time a new trial. *Tomlinson v. Blacksmith*, 7  
*D. & E.* 132.\*

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\* In that case, the amendment was by altering the verdict  
from a small to a larger sum; which amendment was moved for,  
on the face of the declaration. The court said, in fact we cannot  
load the defendant with more than the jury of his country has  
determined, without sending him back to another jury.

## CASES OF PRACTICE

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*Williams* and *Van Ness*, contra. The application on the part of the defendant, is to amend the verdict from the notes of the judge, so as to apply the evidence to the first count only, and to enter verdicts for the defendant on the second and third. It is evident that the testimony could have gone only to the first, for the two last are stated simply as contracts, though the form be somewhat like that on a note of hand.— They were engagements to an organized company, and it was only in relation to *that* company, that they were taken; they must, therefore, comport with the defendant's liability to that company, under the first count. When a general verdict is given, it is almost of course to amend, if *that* verdict does not correspond with the judge's notes. *3 D. & E.* 659.\* So in *Eddowes v. Hopkins*,† it was ruled, that if the evidence be only on a good or consistent count, and there be others bad in point of law, a general verdict given on the whole declaration, shall be amended according to the judge's notes. Even in a criminal case it has been done, and the criminal executed according to the amendment. *Grant v. Astle*, *Doug.* 370.

\* *Doug.* 376.  
See also,  
*Williams v.*  
*Breedon*, 1  
*Box. & Pal.*  
329.

In slander, it is true, where some counts are for words not actionable, and others for words actionable, on a general verdict, judgment will be arrested, but even then the court will order a *venire de novo* to as-

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\* *Petrie v. Harmay*. There were two issues in that case, the verdict was on one, and no notice taken of the other, the amendment was allowed after error brought, and this assigned as a cause, on payment of costs.

sess damages on the good count. An application like *Nov. Term, 1803.*  
the present is never too late. In 1 *D. & E.*\* it is said an amendment will be ordered even after error brought, and the record sent back from the exchequer chamber. The same principle is found in *Taylor v. Whitehead, Doug.* 746.† If we are successful on the point of an amendment, all objections taken to the second and third counts are at an end. But even should these be objected to, we contend they are good. The instrument declared on, is an engagement in writing by which the defendant promised to pay. The being a note in writing is enough, and purports a consideration though none be stated. 2 *Black. Comm.* 446. *Pillans v. Van Mierop,* 3 *Burr.* 1670.‡

\* *Green v. Rennet,* 783. per *Buller, J.* But that case does not apply to amendments of verdicts. It relates to amending mistakes by the act of the clerk, where there is something to amend by. As if he enter against an executor, judgment *de bonis propriis*, instead of *de bonis testatoris*.

† The decision referred to, is very different. A verdict had been found for the defendant ; a motion for a new trial on account of the verdict's being against evidence had been denied, after which the plaintiff obtained a rule to show cause why he should not be allowed to enter up judgment on that issue, because, notwithstanding the finding of the jury, the point of law was in favour of the defendant. The court said this being a motion in the nature of one for an arrest of judgment, was never too late before judgment entered up.

‡ The two books cited, will certainly warrant the position of the learned counsel, but the parts referred to are not law. In *Sharington v. Strotton, Plow.* 358. it is said, " By the law of this land, there are two ways of making contracts, or agreements for lands and chattels : the one is by words, which is the inferior method ; the other is by writing, which is the superior.

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KENT, J. That doctrine has been completely overruled in a case where *Skyner*, Baron, delivered in the House of Lords the unanimous opinion of the twelve judges.

*Caines. Amicus curiae. Rann v. Hughes, 7. D. & E. 350.*

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" And because words are oftentimes spoken by men unavoidably  
" and without deliberation, the law has provided that a contract  
" by words shall not bind without consideration. But where the  
" agreement is by deed, there is more time for deliberation ; for  
" which reason they are received as a lien final to the party, and  
" are adjudged to bind the party without examining upon what  
" cause or consideration they were made." The reader will observe, that when *Plowden* speaks of contracts by writing, he means by deed under seal. This is more explicitly declared in the case of *Rann v. Hughes*. Baron *Skyner* there says, " All contracts are by the laws of *England* distinguished into agreements by **SPECIALTY**, and agreements by **PAROL** ; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they are merely **WRIT-TEN**, and not **SPECIALTIES**, they are **PAROL**, and a consideration must be proved." In *Pillans v. Van Mierop*, WILMOT, J. argued, that if a stipulation, which was only by words, was, according to the civil law, binding without consideration, *a fortiori*, so must be an agreement in writing. But the civil law itself will not warrant this reasoning. The obligatory force of a stipulation arose from the words being spoken in a precise form, before a public officer ; for, if that form was not adhered to, the stipulation was void : therefore if to the question **PROMITITS**, the party stipulating had answered **SPONDEO**, the stipulation was a nullity. I am therefore disposed to think, that the stipulation was taken in the manner of our recognizances, and when acknowledged became a species of record. I am peculiarly induced to this opinion, from the manner in which they are now entered among the acts of the

*Van Ness.* A written contract without consideration may be declared on as it is. Nov. Term,  
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**Lewis, C. J.** This court has decided that a contract merely in writing, does not supersede the necessity of a consideration.

*Williams.* That the contract was not consummated by payment of the \$10 required by the act, is also urged as a reason why the action cannot be maintained, but surely the commissioners might have dispensed with this. As to the objection that the promise was given to pay such sum as the *President, Directors and Company* should order; and that the order was only by the *President and Directors*, it can hardly be thought the defendant ever hoped to rely upon it. The *President and Directors* are the agents of the *Company*, duly chosen by them physically and legally to express their will. The order made by the *President and Directors*, is an order made by the *Company*. This follows necessarily, for the *President and Directors* are, by the words of the law, to act for

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court, in those of the *English* tribunals, which follow the civil code; and also from considering, that the reduction of a contract into writing did not, even by the rules of the *Roman* jurisprudence, preclude from entering into the consideration on which it was made. By that system the *obligatio litteratum* arising from the contracts *ex literis*, was invariably contestible in the three following cases: 1st. When the consideration was not expressed. 2d. Even then within two years. 3d. In all cases of loans of money, by the *exceptio de non numerata pecunia*, which threw the *onus* of proving a consideration upon the plaintiff. The codex, too, is express that no form of words or writing, but assent alone, formed the contract. *Cod. lib. 2. tit. 3. l. 17.*

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1803. and to manage the concerns of the *Company*: when they were chosen the powers of the *Company* were transferred to them, and this being under the letter of the statute, they were the only persons to make the order. Had it been complied with, the defendant would never again have been called upon for any thing paid under it.

*Harrison*, in reply. In support of the notice in arrest of judgment, nothing can be more clear, than, that where entire damages are given, and one count is bad, the judgment must be arrested. But in this declaration, there is not one good count, and this is apparent on the face of the record without any aid *attinge*. On the first count, the objection, as to the order, is certainly fatal. The act operating like a charter, specifies a particular manner in which the orders of the subscribers are to be made; the bye-laws of the *Company* are not to oppose the laws of this State, or the laws of the Union; and yet, supposing the *Company* to have authorised the *President and Directors* to make orders on the *Stockholders*, that very authority can be supported, only by allowing a violation of the law by which the *Company* itself is incorporated. If one branch of those by whom a specific act is ordered to be done, can be dispensed with, another may, and there is no saying how far this principle is to be carried; no power can be exercised under the statute, but what is created by it, and executed in the manner it prescribes. On the point in consideration, the authority from 5 D. & E. is decisive: no consideration appears by the declaration; the amendment asked must be denied, because it is evident whatever

went to support the first count, must have been applicable to the second and third counts, which were on the same note as that mentioned in the first ; if so, *Eddowes v. Hopkins*, relied on by the plaintiffs, shows the amendment cannot be granted.

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*Per Curiam*, delivered by RADCLIFF, J. In this case there is a motion in arrest of the judgment, founded on objections made to all the counts in the declaration.

The counts are three in number, and the objections which apply to all are,

1st. That the promise or contract set forth in the declaration is void for want of consideration, and connected with this is another objection, which was distinctly urged, that the first instalment of \$10 not being paid, the contract was incomplete, and not obligatory on the *Company* and therefore also void.

2d. That the commissioners appointed by the act did not, as soon as 1,000 shares were subscribed, give the notice required by the act to choose *Directors*.

3d. That no order or determination of the *President*, *Directors* and *Company* requiring the payment of the instalment in question, is stated in the declaration to have been made.

To the second and third counts there is a further objection, that the plaintiffs have declared on the promise or subscription in writing, as upon a promissory note within the statute.

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As to the first, the form of the subscription which contains the promise, is prescribed by the act in the following terms : " We whose names are hereunto subscribed, do for ourselves and our legal representatives, promise to pay to the *President, Directors and Company of the Union Turnpike Road*, the sum of 25 dollars for every share or stock in said *Company*, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said *President, Directors and Company*." The declaration states the plaintiff's subscription in these terms, but does not aver that the 10 dollars on each share were paid, and which the act required the defendant to pay at the time of subscription.

I cannot discover any ground on which this promise ought to be considered as void. The subscription was taken by commissioners who were authorised to receive it, and in the form prescribed by the act. That form contains an absolute promise to pay the money to the *President, Directors and Company*. On the one side the interest of the *Company* in selling the shares, and the public advantage to be derived from the success of the institution, and on the other the expected profits to accrue from the stock, were sufficient considerations to render the promise binding. By force of the act itself it must be considered as good. The legislature also must have intended that it should be obligatory, for else the formal manner in which it was prescribed to be taken would be senseless and nugatory. I cannot imagine that a contract in terms so express and complete should be designed to mean nothing.

The last section of the act by which the *Company* was created, cannot, in my opinion, destroy its effect. Nov. Term,  
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It is thereby further enacted, that the *Directors* may call for and demand the sums so subscribed, at such times and in such proportions as they shall see fit, under pain of the forfeiture of the shares and all previous payments. This provision was designed as an additional security for the proportion of the shares which should remain unpaid, and to enable the *Company* by a decisive measure to compel the prompt payments which the objects of the institution required. They had an election to adopt this expedient, and exact the forfeiture, or to enforce payment in the ordinary course by a suit on the original contract. Not having insisted on the forfeiture, they of course have a right to maintain this action.

The objection which is founded on the idea that the contract was not obligatory on the *Company*, and therefore not mutual in its operations, I also think is not well taken. The subscription was for the full sum originally due for each share. The 10 dollars on each share were due immediately, and the engagement with respect to that sum was like a note or obligation payable on demand. The contract was complete and the defendant had a right to tender the payment of the 10 dollars, and demand its performance on the part of the *Company*, who had an equal right to enforce it against him. Neither party could revoke it without mutual consent, or a default on the adverse side. I, therefore, consider the contract as reciprocally binding, and founded on a valid consideration,

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1803. The second objection is, that the commissioners appointed by the act did not, as soon as 1,000 shares were subscribed, give notice to the stockholders to choose *Directors*. This was, I think, properly relinquished by one of the defendant's counsel. It does not appear when the precise number of 1,000 shares were subscribed. The defendant subscribed his shares on the 17th of April, 1801, and it is averred, that on the 21st of the same month upwards of 1,000 shares, to wit, 1,990 were subscribed, and that the commissioners, on that day, gave notice, to choose *Directors*. The particular time of giving this notice, after 1,000 shares were subscribed, could not be material. The act in this respect was merely directory to the commissioners, and if they did not strictly execute their trust, it could not affect the existence of the *Company*, nor any contracts made with them.

The third objection is, that no order or determination of the *President*, *Directors* and *Company*, requiring the payment of this instalment, is averred. It is averred that the *President and Directors only*, made the order. The promise was made to the *President*, *Directors* and *Company*, according to the form prescribed by the act, and it is therefore argued, that this order ought to have been made by the *Company* as well as by the *President and Directors*. This criticism ought not to prevail against the only practicable construction that can be given to the mode of executing the powers of this corporation. It is obvious that the *Company*, in their collective capacity, can never act. The *President and Directors* are their representatives, and they alone are authorised to man-

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age the concerns of the *Company*. The act invests them with this power, and it is thus set forth in the declaration. They alone could require the payment in question, and the order was properly made by them.

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The last objection applies to the second and third counts only, in which the plaintiffs have declared on the defendant's subscription as upon a note of hand, without setting forth the act, or any consideration to support the defendant's promise. It is not expressly declared upon as a note within the statute concerning promissory notes, but the counts can be supported on that idea alone, for they do not state any consideration independent of the making of the note. The shares of stock to which the defendant would be entitled, are not set forth as the consideration of the promise, but merely as descriptive of its extent, and as designating the amount he undertook to pay. These counts, therefore, cannot be maintained unless the note be considered to come within the statute, which I think it does not. Although by the note the defendant promised to pay 25 dollars for each share, it depended on the future operations of the *Company*, which was not yet organized, whether the whole or any part of that sum would finally be demanded or become due. The payment was, therefore, uncertain and contingent, and such a note has frequently been held not to come within the statute, and can be declared upon only as a special agreement.

These counts being, therefore, defective, and the verdict general, the judgment ought to be arrested unless the verdict be amended by applying it to the

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first count in the declaration. An application for that purpose was made by consent, concurrently with the motion in arrest of judgment. And if the judge before whom the cause was tried will certify that the evidence applied solely to that count, or, as I apprehend the correct rule to be, that all the evidence given would properly apply to that count as well as to the others, I think the amendment ought to be allowed. The practice of amending in such cases is well established, and is consistent with reason and justice to the parties. The result of my opinion, therefore is, that the judgment be arrested unless such amendment be made, and in that case, that the motion be denied.

**LEWIS, C. J.** These are actions of *assumpsit*, brought by the *President, Directors and Company of the Union Turnpike Road*, against the defendant, *Thomas Jenkins*, on two several subscriptions, amounting to two hundred and eighty shares in the capital stock of said *Company*, for certain payments called for, pursuant to the act of incorporation, by the said *President and Directors*.

The declaration contains three counts. The first sets forth the act of incorporation, the formation of the *Company* pursuant thereto, the subscription of the defendant, the call for certain payments of seven dollars on each share, and his refusal to pay, whereby he became liable, &c.

The two remaining counts are on the several subscriptions of the defendant, as on his promissory notes.

A verdict was found generally for the plaintiffs, and the cause is now before us, on a motion in arrest of judgment, on the part of the defendant, and a motion on the part of the plaintiff, to amend the verdict by the notes of the judge who tried the cause, so as to confine it to the first count in their declaration, on an affidavit, that no evidence was offered on the other counts.

The principal ground of the motion in arrest of judgment is, the alleged want of a consideration to support the promise, without which, it is insisted, the action is not sustainable. On the record no consideration is stated. No loss or gain to either party; and testing the conduct of the commissioners, by the provisions of the act, none is to be found, in my opinion, in the contract itself. The act requires, that to constitute a stockholder, he shall subscribe an engagement in the words following: "We, whose names are hereunto subscribed, do for ourselves and our legal representatives, promise to pay to the President, Directors and Company of the Union Turnpike Road, the sum of twenty-five dollars, for every share of stock in the said Company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said President, Directors and Company." It also further requires, that every subscriber shall, at the time of subscribing, pay unto either of the commissioners, the sum of ten dollars, for each share so subscribed. The subscription and payment are both essential to the consummation of the contract. These were cotemporaneous acts.

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The declaration states the subscription by the defendant merely, without averring any payment or demand of the ten dollars on each share; and it was admitted on the argument, that, in fact, they were neither demanded nor paid.

I cannot see, then, any consideration for this promise; and the legislature appear to have been apprized of the inconvenience that might arise from this source, and have provided for it, in some measure, by the last clause in the statute, which gives a power to the *Directors*, "to call for, and demand of "and from the stockholders respectively, all such "sums of money by them subscribed; or to be sub- "cribed, at such times, and in such proportions "as they shall see fit, under pain of forfeiture of "their shares, and of all previous payments made "thereon,"

Suppose the speculation had been an advantageous one, and before the first call of the *President* and *Di- rectors*, the stock had risen considerably in value; could not the *Directors*, with propriety, have refused to consider Mr. *Jenkins* as a stockholder, on account of his not having made the payment required by the act on his subscribing? I think they could. No *positive* benefit then, arising from the future emoluments of the *Company* transactions, can be considered as a consideration for the promise, and if it could, none such is stated on the record.

Notwithstanding the motion to amend, it was insisted the suit was maintainable on the second and third counts. I think not. For a promise to pay on

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a contingency, which may or may not happen, cannot be declared on as a note of hand. The instrument must be *payable at all events.*

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The propriety of amending, I need not consider, as I am of opinion, no suit can be maintained on the first count for want of a consideration.

I am of opinion judgment ought to be arrested.\*

*The People v. Samuel S. Freer.*

A RULE had, in the last term, been granted against the defendant, to show cause on the first day of the present term, why an information should not be filed against him, and no cause having been shown on the day appointed, the rule was made absolute.

*Hoffman* now stated to the court, that the defendant had been prevented by adverse winds, which detained himself, counsel and papers, until after the rising of the court on the first day of the term, and prayed that the rule might be overruled.

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\* After pronouncing the judgment of the court, RADCLIFF, J. observed, that he thought the regular practice was to obtain the certificate of the judge before whom the cause was tried, that the evidence applied only to the count on which it was meant to enter judgment. KENT, J. who tried the cause, said the affidavit of the plaintiffs' attorney was correct, and therefore he deemed it sufficient for the amendment. In this the bench concurred.

Nov. Term, 1803. *Per Curiam.* It is of course. Take your motion  
but show cause, on the first non-enumerated day.

*The People of the State of New-York v. Caleb Brown and others.*

THIS was an information filed at the direction of the legislature, by the late attorney-general, against the defendants, for an intrusion on certain lands lying in the county of Otsego.

The defendants claimed under letters patent, of the 6th September, 1770, for 9,200 acres, granted by his Majesty, George III. of Great-Britain, France and Ireland, king, &c. at a quit rent of 2s. 6d. sterling, for every hundred acres. After the usual reservations of mines, and white pine trees, for masts, the grant contained the following proviso : " *Provided,* further, and upon condition also, nevertheless, and we do hereby for us, our heirs and successors, direct and appoint, that this our present grant shall be registered and entered on record, within six months from the date hereof, in our secretary's office, in our city of New-York, in our said province, in one of the books of patents, there remaining ; and that a docquet thereof, shall be also entered in our auditor's office there, for our said province, and that in default thereof, this our present grant shall be void and of none effect, any thing before in these presents contained, to the contrary, thereof, in any wise notwithstanding."

It was admitted, that no docket of the said letters patent, had been entered in the office of the au-

ditor, pursuant to the said proviso; but the following entry made since the year 1797, is found in a memorandum, took of patents in the office of the comptroller, of this state, to wit: "1558, patent granted to *Leonard Lispenerd,\** and others, for 92,00 acres of land, in *Albany* county, dated the 6th of *September*, 1770, at 2s. 6d. sterling for every hundred acres." About the same time, when the above memorandum was made, *Samuel Jones*, Esq. comptroller of this state, pursuant to the laws relative to quit rents, caused the aforesaid tract of land to be advertised<sup>†</sup> for payment of the quit rents due.

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The name  
of the first  
patentee.

Under the  
8th section  
of the "act  
concerning  
quit rents,"  
passed the  
8th of April,  
1801.

It was further admitted, that on the 3d of *April*, 1799, the sum of 3 dollars and 84 cents, was paid into the treasury of this state, by *George Stanton*, one of the original patentees, in pursuance of the act for the collection of quit rents, as the arrears and computation then due, on lots no. 41 and 42; and that on the 28th of *October* following, 3 dollars and 82 cents, were in like manner paid, on 50 acres of the grant, by one *Jesse Clark*, who had purchased under the patent, from which the defendant *Brown*, derives his title; but neither the lots 41 and 42, nor the 50 acres on which the said 3 dollars and 82 cents were paid, constitute any part of the lands in his tenure.

On these facts, it was submitted to the court, whether the defendants were or were not guilty of the intrusion complained of.

SPENCER, Attorney-General. It is admitted, that there was no docket entered in the auditor's

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office, according to the proviso in the letters patent. The information is grounded on this principle ; that the forms required by the grant created a condition, proviso, or limitation, which was to make it void, on the not doing a certain act by the patentees. If, therefore, this act has not been performed, the instrument is a nullity, and the people have a right to consider all persons now on the land as intruders. It may, perhaps, be urged in behalf of the defendant, that the act concerning quit rents has done away the forfeiture : especially, as the officers of government have received the quit rents due, and have, therefore, considered the patent as in existence and good. That, however, will depend on whether the not docketing the patent within the time limited, did not cause the estate of the patentees instantly to cease ; or whether, even allowing the contrary, the payment could purge the forfeiture for more than those very lands on which made, and which do not include those for which the intrusion is brought. There can be no doubt that every grantor, whether a state or an individual, may annex to his grant whatever conditions he pleases, provided they are not repugnant to principles of law. Here the condition is, that the grant shall "*be void and of none effect.*" Therefore, the acceptance of rent could not restore what was gone. Sir *Moyle Finch's* case, *Cro. Eliz.* 321. shows the soundness of this position. This, it may be said, was the case of a demise for years. A distinction, therefore, may be attempted between *that* and the present, which is of a fee. In fact, however, the diversity does not exist. This the

court will see in 17 *Vin.* 81. *pl.* 1. *n.\** it is not, that in one case the estate is void, and in the other voidable ; but whether the determination be by the same means as create the interest. The proviso here, was a limitation which ended the estate on non-performance, because, as it was created by matter of record, so it was to be destroyed by matter of record. It is generally true, that where a freehold is to be defeated, entry is necessary, but it is not so, where an act that ought to appear of record is not done. It is laid down, that if an estate granted by the crown determine by a condition broken, the king shall be seised without office found, where the breach is apparent upon record. 7 *Com. Di.* 53. (*D.* 70.†) It is the revesting of the estate which we contend for here. This makes the difference between the present question, and that of *Van Shaick*, in 1796, in which it was decided, by the court of errors, that a new grant would not be made till after office found, not that an information would not lie before. There can be no doubt of the words used in the grant creating a condition, *Lit. sec.* 329. which was a limitation or qualification of the estate. For this

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<sup>f</sup> The cases  
there refer-  
red to, are of  
leases.

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\* The decision alluded to, is *Stephens v. Potter, Cro. Car.* 100. 2 Res. but that merely determined that a lease for years, reserving rent payable at the exchequer, is void on non-payment, without office found ; whereas, if the rent be payable to the receiver-general, non-payment without office found, does not vacate. The reason is obvious, as the crown can grant only by record, it can be informed only by record ; the non-payment to the receiver, is a matter in *fals* ; when found by office, it is of record, and so is non-payment at the exchequer. See this, however, doubted, 2 *Roll's Abr.* 216. (*H.*)

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1803. purpose, the word "provided," was certainly the most fit. On breach of it, the estate must be judged in the grantor; or, as here, in the people, *Lit. acs.* 350.\* So here, as the non-performance was a record, the right to proceed by intrusion accrued before office found, the estate of the patentees being totally divested. The next consideration is, whether any thing has been done to waive the forfeiture. This may be laid down as an established position, what is void cannot be confirmed, what is voidable may. As, then, the interest of the patentees was absolutely annulled, the receipt of the quit rents could not revive it, *Jenkins v. Church, Cwp.* 482. *Doe v. Butcher, Doug.* 50. Even in voidable cases, the mere acceptance of rent, unaccompanied with any

† See *Green's case, Cro.*

*Eliz. 3. Roe v. Harrison,* 2 *D. & E. 425.* No receipt can revive or confirm, unless taken with a knowledge of the forfeiture, and an intent to waive.

The act concerning quit rents does not recognize any loss of title in the defendant, or others holding under the same patent. No payment, therefore, to an officer acting by authority of a general law, with a power merely to extinguish quit rents could revest. All that he could do was to bar the right of the people on them when due, and not by taking them if not due, to give away the land of the state.

\* The case of a lease for five years, with condition to have fee, on paying of 40 marks at the end of two years, and livery of seisin according to the deed. Revested by implication, because grantor could not enter upon the breach, as, by his own grant, the grantee had three years in the land.

*Emott* and *Van Vechten*, contra. Though from the length of time the defendant, and those under whom he claims, have been in possession, the case is a hard one, still we are ready to exculpate both the present and late Attorney-General, from all imputation of rigour. They have acted only in obedience to resolutions of the legislature. The case divides itself into two questions. 1st. Whether the grant be void, or voidable ? 2d. Whether, if so, the present form of action is the appropriate remedy ? Whether, void or voidable, will depend on a number of subordinate inquiries. We did not, it must be confessed, expect that the proviso would have been urged as a limitation, which always goes on a certain express time of determination ; it is a condition\* and nothing more, in which case, as the estate might continue over, it was voidable, and not void. But the words in question, created neither the one nor the other ; they were merely directory on the officers of government, and did not oblige us to do any thing : they are separated from the conditions by which the grantees were bound by specific acts. The words are, "we direct and appoint." The clause itself is rare, this being the only grant we can find, in which it is contained. The officers of government ought, the clause being directory, to have given notice to the patentees to come in and docket ; for, to the patentees themselves, the act was nugatory, as they had complete evidence of the right by the grant itself. But, considering the clause as a condition, then we contend, it is repugnant to the grant, and void. It was for an act to be done by the officers of the crown, for the benefit of the crown alone. It is

\* As to conditional limitations, see  
Fearn, Com.  
Rem. 6 ed. 9.

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1803. the same as if a grantor had conveyed, on condition that he should himself lodge the consideration money within twenty days, in the *United States Bank*, or the conveyance be void. The result would be to put the whole grant within the power of the crown; or what is the same thing, within that of its officers. But should the condition in the proviso be deemed a valid one, and obligatory on us, we say it has been performed; for, if the intent be complied with, it is sufficient. That the leaning of the court is against forfeitures, we cite *Bull. N. P.* 96. and that the intent, and not the letter of the words, ought to regulate, *Shep. Touch.* 139.\* 1 *Atk.* 375.† *Daley v. Desbouverie*, 2 *Atk.* 261. and the cases cited in p. i. What, then, was the intent to be answered by this docket? Merely to inform the court of the existence of the grant, and the value of the reserved rent, that no interfering patents might issue, and the amount of its revenue be known. The entry, therefore, in the comptroller's office, taken from the old minutes there, was fully adequate to every purpose. For, though two acts are mentioned in the proviso, to be done, it does not follow, that both are necessary to be performed. *Long v. Dennis,*‡ 4 *Burr.* 2052.

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\* That is, if the act done be in law tantamount to the condition expressed, as if to enfeoff; and a lease release be executed. So, in the case put, *Litt. sec. 352.* on the doctrine of *cy pres.*

† *Harvey v. Aeton*, the condition there, was marrying with consent. The other authority from *Atkins*, relates also to conditions in restraint of marriage.

‡ That also, was a decision on a case in restraint of marriage, in which the conditions were held to be in the disjunctive, performance, therefore, of one sufficient.

In the present case, however, after a lapse of 30 years, in a country circumstanced as this was, during the revolutionary war, and when the very record may be supposed to have been taken away by the officers of the crown, to presume a docket regularly entered, is no more than what the law will warrant. *Bedle's case*, 12 Rep. 5. Should it, nevertheless, be held, that the forfeiture was incurred, we still contend that it has been waived. The argument urged against this position, that there is a distinction between the acts of individuals, and those of officers of government, is contrary to the implication arising from the case of *Sir Moyle Finch*, relied upon by Mr. Attorney-General. For the people are bound by the acts of their agent, in the same manner as any common person. What, then, are those acts? First, the permitting thirty years to elapse in silence; next, the comptroller has made a record or docket, by entering the memorandum stated in the case, to have been written in 1797: it fully sets forth the dates, parties, and rents: this, too, is an act of a public officer. Secondly, by advertising these very lands for the quit rents due, under the authority of the act mentioned in the case. For the language of the advertisement is, we claim not the lands, but the quit rents due. Thirdly, the comptroller has received from one of the patentees, and from a person holding under the grant to them, quit rents for some of those lands, and though they have been paid but upon portions of the tract, yet they will accrue to the benefit of the whole grant. *Goodright v. Davids, Cowp.* 803.\* *Pennant's case*, 3 Rep.

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\* The point there was, that acceptance of rent, after condition broken with notice of the breach, is a waiver of the forfeiture.

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64 b.\* *Green's case, Cro. Eliz. 3.* † *3 Saik. 3.* Independent, however, of what has been before advanced, we contend, that an information for an intrusion cannot be supported before office found. This is absolutely necessary to entitle the people to proceed. In the case of common persons, if it be intended to destroy an estate for condition broken, it is indispensable that an entry should first be made, *Shep. Touch. 153.* Whenever an entry is required of an individual, an office must be found for the king, *9 Rep. 96 b.* ‡ *16 Vin. Abr. 84. pl. 24. p. Ibid, 83. pl. 19, 20.* Even where the whole estate has become void, by the non-performance of the condition, still an office must be found before the tenant can be held an intruder, *Sir Moyle Finch's case, 2 Leon. 143., Payne's case, ibid, 206.* The proviso on which the Attorney-General relies, being a condition, and the estate under the patent taking effect immediately, it is plain that the grant was voidable only, and not absolutely void. This being so, and nothing done to avoid the grant, and put the people into possession, intrusion cannot lie, for it is essential to intrusion that it be on the actual possession of the crown, *3 Black. Com.*

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\* Which of the resolutions there made is alluded to, I know not; possibly the third, but that goes on the distinction between void and voidable leases.

† Determined that receipt of rent due, does not prevent re-entry, but if accompanied with a receipt calling the lessee, his farmer or tenant, it does.

§ The words in *Moore*, are, " an information for intrusion is not a real, but personal remedy, and resembles in all points a trespass against a subject, for it supposes the queen in possession."

261. *Moore*, 375. Therefore, in all cases of forfeiture, &c. intrusion will not lie till office found, this being the legal substitute for entry by a private person, and the only means for the crown to regain the possession, for the injury to which the intrusion is brought, *Litt. Abr.* p. 97. (E.) *Moore*, 296, 7. That this is only to be done by office found, *Parstow v. Corn, Cro. Eliz.* 855. is an authority fully in point. Besides, the title created by the patent was matter of record, and of course must be avoided by that which is of equal solemnity, *Plowd.* 229. and the cases there cited. The only method, then, to have been pursued, was by an office finding the forfeiture, and intrusion upon that. This will appear still more evident, if we consider the effect of the different proceedings. On the inquest of office, performance of the condition, or refusal by the officer, which is tantamount,\* might have been shown, but this could not be done under an information for intrusion, which merely states the possession of the crown, and the defendant's intrusive entry, case of *Alton Woods*, 1 *Rep.* 28. *Plow.* 479. The necessity, therefore, of these measures must appear, that the parties might have notice of the grounds of the claim against them.— This cannot be done by the information now brought, which is not like a writ of escheat that sets forth the whole claim on the part of the crown. If what has been laid down already for us be true, that the docketing was a duty to be performed by the officer, then it is for the honour of the crown, as the old books say, to be presumed that it has been done, case of the *Churchwardens of St. Saviour, Southwark*, 10 *Rep.* 66. For it can never be imagined, that the crown would make a grant, dependent for its validity

\* 10 *Rep.* 67  
b. 2 *Rep.*

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on acts to be performed by itself, and omit those acts. Let it be observed too, that no form of docketing is prescribed by the grant; and as the revolutionary war has intervened, it may well be intended that the entry made in the comptroller's office in 1797, was by way of docket, which would be no more than a memorandum for the guidance of the officers of the crown. If, however, the proviso be a voidable condition, then the doctrine of waiver will apply. For government can never be supposed to do so great a wrong as to permit men to make improvements, then offer to receive a commutation in discharge of quit rents due on those very lands which they claim as forfeited, receive the amount, and then attempt to defeat their grant. Because, having dispensed with the condition in part, by a partial receipt of quit rents, the condition is dispensed with in the whole. *Cro. Eliz.* 816.\*

*Dumper v. Sims.* This species of construction is due to the liberality and honour which we are to suppose constantly actuate the proceedings of government, and is a principle universally acknowledged. 9 Rep. 131. *Benley's case.* *Rolyn's case,* 6 Rep. 5. 10 Rep. 67. In a more peculiar manner is this to be adhered to after a lapse of 30 years, when the rights of third persons, *bona fide* purchasers, and others, are implicated. In *Van Schaick's case*, it was settled, that where a forfeiture was apparent by matter of record, then a *scire facias* should go; when it arose on matter in *pais*, an office must be found. The information, therefore, must fall.

*Spencer* in reply. The words of the proviso are sufficient to show the docketing was not directory to the officers of the crown. The grant was to be valid.

on doing several acts, some in *pais*, some in record. Nov. Term,  
1803. If not performed in a certain time, the letters patent were to be *void*. The words direct and appoint, are declaratory to the patentees, that the estate granted, should be subject to the condition, of their registering and docketing. This must always be at the request of the parties, who must do an act towards it : nay, they, according to the colonial system, had to pay for its being done, and, therefore, was clearly a duty in them ; for it is coupled with a stipulation, that if it be not performed, the letters patent shall be *void*. This makes the proviso a limitation ; and when so, it is not necessary that an office should be found, because the crown would be immediately reseised. *Poph.* 53. Whether, however, it be considered as a limitation, or a condition, is immaterial ; for no office was necessary. It is required only to make the forfeiture known by matter of record.— Here the docket for a matter of record, and whether the grant was docketed or not, would appear by inspection of the records. The forfeiture, therefore, being thus by matter of record, needed not to be found by office. The authorities cited by the other side are in conformity to this position. *2 Roll. Abr.* 215. *Cro. Car.* 100. *Stephens v. Potter.* On the not docketing according to the terms of the proviso, the estate of the patentees was gone, and this being by matter of record, the people were reseised. No act, therefore, of their officer in taking rents not due, could revive an interest absolutely avoided and null. The cases from *Cowper* and *Douglas*, when looked into, will show this, though they are quoted as authorities against the people. The principle they settle is, that no acceptance will waive a forfeiture, without

Nov. Term, 1803. knowledge of all the circumstances by which that forfeiture was worked. The people had acquired fee on breach of the condition. The quit rents, therefore, were merged, and a tortious taking by their officer of what was not due, not knowing it not to be due, can never waive their rights.

*Van Vechten.* We say, by the act he was constituted judge whether quit rents were due or not.

*Spencer.* We say he was not ; that he was a mere receiver, delegated to receive alone. The act of the officer in making the entry in 1797, was, allowing his acts to enure to the advantage of the defendant, yet it was not in time. In arguing from the presumption the 30 years lapse has afforded, the coun-

\* Act for limitation of criminal prosecutions, and of actions at law. 1. Rev. Laws, 562. sel seem to forget, that there is a law\* by which the limitation of suits by the people for land, is settled at 40 years. It is an absurdity to settle a limitation at 40 years, and presume against it at 30. Nor can any thing be presumed from the revolution, because the court knows all the papers in the various offices were preserved. In one of the cases referred to, the presumption arose from this ; that as the deeds were

† 10 Rep. 67. 2d Rev. delivered in to be cancelled, † the officer should be presumed to have cancelled them ; but were the deeds here delivered to be docketed ? On every ground, therefore, we consider the people entitled ; especially as the want of docketing is proved by the records, and an office found would be only surplusage.

*Per Curiam,* delivered by LEWIS, C. J. This is an information of intrusion, filed by the late Attorney-

General, and now prosecuted by his successor in office. It comes before the court on a case, which sets forth, that a royal grant, by letters patent, issued in 1770, to *Leonard Lispenard* and others, for 9,200 acres of land, now in the county of *Otsego*, but then in the county of *Albany*, on the annual quit-rent of 2*s. 6d.* sterling per hundred acres. The grant contains sundry conditions, on the non-performance of any of which it is declared to be void and of none effect. Among the number, are the following: that the grant shall be registered and entered on record, within six months from the date, in the secretary's office; and that a docket thereof, shall be also entered in the auditor's office. It is admitted, that though the letters patent were duly recorded, no docket was found in the auditor's office; but that a note of them is found, entered in a memorandum book of patents, kept in the office of the comptroller of the state, bearing date in 1797, and that the quit rents, on parts of the tract, have been paid to the existing government.

The defendant claims title under the said patent, and the question for the court is, Guilty or not Guilty.

To decide this question, it is necessary to inquire whether an information of intrusion lies under the circumstances of this case. To sustain a prosecution of this description it is necessary that the crown formerly, and the government now, should be in the actual seisin or possession of the subject intruded on. I shall lay down a few general principles or maxims,

Nov. Term; 1803. which I conceive incontrovertible, and which may be gathered from the two principal cases, relied on, that of Sir *Moyle Finch*, and of Sir *George Reynel*, as well as from the decision of the court for the correction of errors, in the case of the devisees of *Van Schaick v. King*.

*Cro. Eliz.*  
220. 2 *Lev.*  
134. 9 *Rep.*  
95 a.

1st. That the state can acquire seisin or possession of lands, for breach of condition, by matter of record only.

2d. That generally where entry is necessary in the case of a common person, an office is necessary to entitle the state.

3d. Where entry and action are necessary to a common person, an office and *sci. fa.* are necessary to the state.

*9 Rep. 95 b.* It is true, there are cases where the crown may be in possession by seizure without office, but they are not cases of this description, they are confined to the forfeitures of the temporality of alien ecclesiastics, where the certainty of the matter appears in the exchequer.

There is an important and striking distinction between the case of Sir *Moyle Finch*, and the one now before us. The forfeiture there was of a term ; here, if any, of fee ; now a fee shall never be void, absolutely for condition broken, but voidable by entry only, though it is otherwise of a term. But even in *Finch's* case, as reported by *Leonard*, who states it much more at large than *Croke*, both *Popham* and

*Croke* who argued for the plaintiff, and *Manwood*, Chief-Baron, in giving judgment for the plaintiff, admitted, that, although the lease was void without office, it was void in interest and property only, but not in possession. And that though the *Queen* without office, and a common person without entry, might grant it over, yet the former could not without office prosecute for an intrusion, nor the latter without entry for a trespass.

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These opinions, I think, decide the question ; and that judgment must be accordingly for the defendants.

*Jackson, ex dem. Edmund Prior, Abraham Knap and Eli Knap, v. Haley Brown.*

THIS was an application for costs for not proceeding to trial. The plaintiff relied on the prevalence of the yellow fever, which, after noticing for the circuit, prevented him from obtaining a paper necessary on the trial.

*Per Curiam.* It does not appear that any countermand was ever given, though there was time for doing so, between the period when the impossibility of procuring the document was discovered, and the day fixed for the circuit. It is true, the act of God is to work injury to no one ; but when, as here, the impossibility induced by that act, could have been communicated to the defendant in season to have prevented his attendance on the circuit, and this was omitted, the fault was with the plaintiff, and he must pay costs.

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*Thomas Kirby v. Salmon Cogswell.*

IT was ruled in this cause, that after a certificate of probable cause to stay proceedings, both parties may notice for argument, and that the not entering and noticing for argument by the party obtaining the certificate to stay, is no cause for a motion to discharge the order;\* especially if made without notice.

\* *Vide ante,*  
p. 259.

*The People v. Freer, Printer of the Ulster Gazette.*

A RULE was granted last term, for the defendant to show cause on the first day of this, why an attachment should not issue against him, for a contempt, in publishing some paragraphs in the *Ulster Gazette*, respecting the trial of *Harry Croswell*, for a libel on the President, then *sub judice*.

*Hamilton*, on bringing in the affidavit of the defendant, (who did not himself appear in court,) moved for an enlargement of the rule till the next term, to consult with the defendant as to expunging some part of the matters introduced, as irrelevant. The idea of an intentional contempt was, he said, denied, but there were circumstances introduced, which counsel thought had better be omitted.

*Per Curiam.* If the application had been to supply any new fact, and that fact had been made to appear by affidavit, it would have been attended to; but we cannot enlarge a rule merely to give counsel an opportunity to consider of the propriety of expunging

parts of an affidavit, which, we must consider, has Nov. Term,  
1803. been made according to the truth of the case.

*Hamilton* then read the affidavit, which did not deny the publication, but only went to negative any intentional contempt or disrespect towards either the court or its members.

*Sandford*, contra. The publication being confessed, the court has only to pronounce, whether it amounts to a contempt or not. The intention, giving it the utmost latitude, can be taken only in mitigation. It cannot make the publication less a contempt. A man cannot justify his conduct by saying, I have offended, but did not mean to sin. The question is simply this, ought an attachment to go for this publication? In deciding this question the court is not to look beyond the words contained in the paper.

*Hamilton*, in reply. I cannot subscribe to the doctrine, that the court will not look beyond the paper itself. This is extending the doctrine of libels. I have heard, that there the truth may not be given in evidence, but never yet did I hear, that another paper, or circumstance, may not be given in evidence to show the intent. So here, the motive of publication may surely be urged to prove, that no contempt, in fact, existed.

*Per Curiam.* The affidavit does not justify the publication. It is at best but an excuse. On such occasions as the present, the defendant ought to appear in person and answer. Let, therefore, the rule for an attachment be made absolute.

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*James Houghton v. Peter B. Strong.*

ON *certiorari* from a justice's court. The declaration, as appeared from the return, stated, that the defendant "privily, wilfully and maliciously, by certain conduct, damaged the plaintiff to the amount of twenty-five dollars." General errors were assigned; and it was principally relied on, that no cause of action was stated in the court, so as to show the justice had cognizance of the suit.

*Per Curiam.* The declaration is bad. It ought to have stated, not only the injury, but how it arose. If this be necessary in this court, it is more so before inferior tribunals, whose proceedings may be reviewed here. Unless the cause of action be stated with certainty, it is impossible for us to know whether the justice had jurisdiction or not. This very suit may, for aught that appears, have been in slander, or for an assault and battery, or for some other matter not cognizable before a justice. Nor does it appear by any part of the record (none of the testimony being returned) what kind of action was proved by the witnesses. The judgment must, therefore, be reversed with costs.

*Mylo Knap v. John Palmer.*

ERROR on *certiorari*. The affidavit on which the *certiorari* was granted, set forth the action to be debt; the *certiorari* itself stated it to be *trespass on the case*. The defendant had served the plaintiff with a rule to assign errors, before the expiration of which,

an application was made to his honour, Mr. Justice Nov. Term,  
~~Kent~~, at his *chambers*, for an enlargement of the time; —  
this his honour was pleased to order on an affidavit of  
the plaintiff's attorney, specifying the original cause  
of action, and that the describing the cause as tres-  
pass on the case, was a mistake. To this affida-  
vit the plaintiff had annexed a copy of a notice to  
move the court to allow the amendment of the *certio-*  
*rari*, and had duly served the plaintiff's attorney.—  
*Woods* now moved for leave to amend the *certiorari*,  
by striking out the words "trespass on the case,"  
and, in their stead, inserting the word "debt."

Ordered accordingly.

*Livingston v. Rogers.*

THE court ruled, that causes which had been no-  
ticed for argument, and duly entered by the clerk, if  
not brought on, are to be re-noticed to the clerk for  
him to re-enter, as they will not be, *of course*, carried  
over to the calendar of the next term.

*Den v. Fen.*

IF, in a feigned issue from the court of chancery,  
an inquest be improperly taken, relief must be sought  
in this court. If an inquest be taken at a circuit court  
by default, and notice of trial has not been given, it  
will be set aside, with costs, to be paid by the plain-  
tiff's attorney.

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*John R. Bowne, surviving partner of John R. Bowne  
and Samuel Embree, v. John Shaw.*

*The same v. William Neilson and George Bunker.*

THESE were two actions on a policy of assurance, on the cargo of the schooner *Polly*, in which verdicts were taken for the plaintiff, subject to the opinion of the court on a case made, with liberty to turn the same into a special verdict.

The only question was on the effect of the warranty against loss, "by capture," or detention for, or "on account of any illicit trade, or trade in articles "contraband of war."

The facts were shortly these: The property insured, no part of which was contraband, really belonged to the plaintiff and his deceased partner, who were also owners of the schooner. They, however, as agents for *Joseph M. Stansbury*, shipped on his account, in the same vessel, other articles which were contraband, and *Embree* even made out the invoice in his own hand-writing. The difference of premium between contraband and other goods for that voyage, was 21 per cent. At the time, however, of subscribing the policy, *Shaw* knew there were contraband articles on board: *Neilson* and *Bunker* did not; and as soon as they did know it, insisted on being discharged from the policy. This the plaintiff agreed to do, but did not erase their names from the instrument. The vessel was taken, and together with her cargo condemned as lawful prize. In promulgating

the sentence, on the 13th of *December*, 1800, the Nov. Term,  
judge rested himself on the general interest of the 1803.  
plaintiff in the contraband. This he inferred from its  
appearing that *Stansbury* was part owner of the ves-  
sel in the *September* preceding, and there being no evi-  
dence of his having ever alienated his share. He also  
relied on the invoice of the contraband being in the  
hand-writing of *Embree*. It was, however, admitted,  
that the plaintiff had not, either directly or indirectly,  
any interest in the contraband articles.

In the case of *Neilson and Bunker*, the return of  
premium was the sole object of suit. The defend-  
ants contending the broker was as much the debtor  
for the premium to the assured, as to the assurer, and,  
therefore, the action improperly brought. The facts  
on this point are fully detailed in the opinion of the  
court.

*Hoffman*, for the plaintiff. The court is called on  
to say, whether the warranty is confined to the goods  
insured by the policy, or shall be considered so exten-  
sive as to guard against all losses, whatsoever they  
may be, arising from any article on board which may  
be contraband. There is no position of law more  
known, or more acted on than, that the mere letter  
of a contract is not to be the rule of exposition. It  
is to be construed according to the spirit, and ex-  
pounded according to the intent. If so, though the  
words be large enough to cover all goods, we may  
examine into the intent, which cannot be better done  
than by inquiring into the reason of introducing this  
clause, the mischief it was meant to redress, and

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1803. the remedy it was designed to afford. It owes its origin to *Seton, Maitland & Co.* They insured contraband merchandize without communicating its nature, and this court decided, a neuter need not avow the quality of his shipment, all goods being to him lawful trade. To communicate to the underwriter, the particular species of commodity shipped, and yet to warrant only as to that commodity, was the clause introduced into our policies. The conduct of *Neilson* and *Bunker* show this construction ought to be adopted. On being informed there were contraband articles on board, they desired to be released from their responsibility ; this was unnecessary, if the warranty covered those articles. The generality of the construction is against it. An importer must warrant against transactions and parties thousands of miles distant, and always in the dark. This would destroy insurance itself. Besides, *Shaw* underwrote with a knowledge of all the circumstances, and must be presumed to have taken the risk of consequences from contraband articles on himself. Our construction, therefore, as to him must prevail.

*Pendleton* and *Harrison*, contra. The intention of introducing the clause, on the construction of which the whole of this controversy depends, was to relieve the underwriter from his general liability. It was an exception from what was considered as the effect of the policy. Being so, the exception must be co-extensive with the effect. The words also used for this purpose are equally large. They are, "for or on account of *any* illicit or prohibited trade." But in deciding the present case, it is not necessary to determine the universal operation of the clause in ques-

tion. The plaintiff here was owner of the vessel. Nov. Term,  
1803. He is presumed connusant of all that comes on board. By the old maritime law, his vessel was liable to confiscation for having contraband on board, merely from the circumstance of his supposed knowledge. This, on general principles, would affect the cargo which belonged to him, because the taint of contraband is communicated wherever there is privity.\* It is only in modern days that we have had the rule relaxed, but that is only when actual knowledge is not proved. Here the reverse is the case, and the circumstance of the plaintiff's partner having written out the invoice, was a principal ingredient in causing the condemnation. In the case of *Neilson and Bunker*, allowing the plaintiff entitled to recover, it must be from the broker, and not from the defendants.

\* See the case of the *Franklin*, 3 Rob. Ad. Rep. 217. and the note there p. 221 (a), where this point is ably treated.

*Hamilton*, in reply. It is contrary to the principles of a warranty, that it should extend to all things. It can relate only to the subject matter insured. When we warrant of a certain thing, we warrant of that thing alone. When we warrant against acts, we may warrant against the acts of all the world. The intent of the clause cannot be doubted. It was framed by myself, to avoid the construction contended for on the other side, and to confine the operation of it simply to the article insured. I have heard that every new clause in an instrument, is but a fertile source of litigation, and it is with regret I find in myself a personal verification of the truth of the remark. But whatever may be the construction of the effect of the warranty, it cannot touch the present case, because all was known to the defendant. I cannot, however, agree, that the operation of the clause is to be differ-

Nov. Term,  
1803. ent against different persons. The rule of law must  
be the same as to all.

*Per Curiam*, delivered by LEWIS, C. J. The question between the parties to this suit arises upon *the warranty against loss by capture or detention for trading in articles contraband of war*. The effect which contraband shall have upon lawful goods, when going to the port of a belligerent, would be here a proper subject of inquiry, had the fact of the *Polly's* carrying such contraband been secreted from the insurer at the time of subscribing the policy. But it is stated in the case, that the circumstance was within his knowledge. It is, therefore, only necessary to inquire into the understanding the parties had of the contract they entered into. The goods covered by the policy on which this suit is brought were lawful, and insured at a premium of nine per cent. Certain contraband articles were shipped in the same vessel by the plaintiffs as agents, and insured at a premium of 30 per cent. With a knowledge of this fact, the defendant subscribed the policy, and as both parties must be presumed equally acquainted with the law upon the subject, he doubtless took the risk of all the consequences that might result to the lawful from the illicit goods : The warranty extending, in the understanding of the parties, to the goods only which were the subject of the policy.

I am, therefore, of opinion, the plaintiff is entitled to recover as for a total loss.

In the case of the same plaintiff against *Nelson and Bunker*, I think the former entitled to a return of

premium. The broker who held funds of both par- New Term,  
1803.ties, debited the plaintiff in account, with the whole amount of premium due on the policy, and credited the defendants for their proportion. In *May*, 1801, he settled with the plaintiff, and paid him a balance which did not include the premium in question. On two several accounts rendered the defendants, the amount of premium still stood to their credit. And although a balance in their favour has always lain in the hands of the broker to a greater amount than the premium, it does not appear to have been left there for the purpose of re-payment to the plaintiff. No authority for this purpose has ever been given, and the defendant must be considered as still withholding it from the plaintiff.

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FEBRUARY TERM, 1804.

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*Job Atterbury v. William Teller, Junior.*

THIS was an action on two promissory notes, on which the clerk had, according to the practice of the court, assessed damages.

A former suit had been brought on the same notes, which were the foundation of the present action.—The attorney for the plaintiff lived in *New-York*, and had not any agent in *Albany*, near to which, the at-

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1804. attorney of the defendant resided. Whilst the plaintiff's attorney was proceeding in *New-York*, to obtain judgment, the defendant's attorney put up, in the clerk's office in *Albany*, the usual notice of appearance, and of a rule to declare, after the expiration of which, no declaration having been received, the defendant, after the regular affidavit of due service, entered a *nonpros* for not declaring. During these transactions in *Albany*, the plaintiff went on in *New-York*; and there obtained, subsequent to the entry of *nonpros* in *Albany*, a judgment by default; after which, the clerk of the court duly assessed damages, and indorsed the amounts on the respective notes. The attorney on record for the plaintiff having been changed, the present attorney discovered the above circumstances, and as the judgment of *nonpros* had been entered in consequence of the original attorney for the plaintiff not having had an agent in *Albany*, he paid the defendant's attorney the costs of *nonpros*, and agreed to vacate his own judgment, which was accordingly done.

A second action being now commenced, the plaintiff was apprehensive, that the assessment of damages under the first, might be made use of on the trial, as a species of judgment already recovered.

*Pendleton*, on affidavits containing the above facts, moved for liberty to strike out the assessment indorsed, and proceed to trial on the merits, in the same manner as if the damages had never been assessed. *Van Antwerp* resisted the motion, relying on the assessment being conclusive as to the amount.

*Per Curiam.* Take the effect of your motion, <sup>Feb. Term,</sup> ~~1804.~~  
with costs of this application, to be paid by the defendant.

*James Jackson, on the demise of Silas Smith v. John Hammond.*

IN this cause, on an affidavit, stating a verdict having been, in 1792, taken for the plaintiff, subject to the opinion of the court, on a case agreed on between the parties, on which judgment had been given in 1798, for the plaintiff; and also, that the *nisi prius* record and issue roll, were not to be found in the office of the clerk of this court, nor the *nisi prius* record among the papers of the former clerk of the circuit, in which the cause was tried, and if left with the plaintiff's attorney, had been burnt or lost, leave was given, to make up and file a new *nisi prius* record, with a *postea* to be indorsed thereon, conformable to the minutes of the trial, and also, to enter up judgment, and issue execution for the plaintiff, according to the opinion of the court in 1798.

No opposition.

*Ambrose Spencer v. Ezra Sampson.*

THIS was an application on the part of the plaintiff for a struck jury, in an action on the case for a libel. The affidavit on which it was founded stated, that the words spoken of the plaintiff, concerning him in his official character as attorney general, were false, and that the cause was at issue.

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*W. W. Van Ness* opposed the motion, and urged, that to entitle to a struck jury, the cause ought to be important *and* intricate : that though he might allow the importance of every cause relating to character, yet, its intricacy he must deny, and both these circumstances are necessary by our statute.

*Per Curiam.* The words of the statute are, "intricate *or* important." It is of great consequence to this court to protect its officers, and those of the public, in the discharge of their duty. Take your rule.

*Richard D. Arden and Epiphalet W. Close v. Randal Rice, Consider White, and Henry Townsend.*

THIS cause had been noticed by the plaintiffs for argument, at the last term, on a general demurrer filed by the defendants to the declaration ; the court had, on the statement of the plaintiffs' counsel that the demurrer was merely for delay, overruled it, and granted a rule for judgment ; the counsel pledged himself to open the rule any day on an affidavit of good cause of demurrer, or of merits. On service of the rule for judgment, the defendants gave a *cognovit*, on which the plaintiff entered up his judgment in the last vacation.

*Foot* moved to set aside the judgment, contending that it could not be entered but in term.

Some little variance of opinion existing on the bench, respecting the practice on this point, it stood

ever till the last day of term, when the court thus de- Feb. Term,  
cided : 1804.

*Per Curiam.* By the 8th rule of April 1796, judgment, after a default entered, may be entered at any time after 4 days in term have intervened. The rule of July term, 1796, ordering all rules for judgment to be entered in term, and not in vacation, was abolished in April term, 1799, and restored the first rule. There is no good reason why 4 days in term should be given in this case to the defendants, any more than on a warrant of attorney to confess judgment. The defendants take nothing by their motion.

SPENCER, J. dissented, on the ground that the practice had been different.

*Robert Gilchrist v. Peter Van Wagenen and John I. Moore.*

*Augustine H. Lawrence v. Peter Van Wagenen.*

THIS was an application by the attorney of the plaintiffs, for liberty to file special bail in both suits, to enable him to surrender the defendant.

The circumstances, as disclosed on affidavit, were these: The defendant, *Peter Van Wagenen*, had been arrested in both actions, one of which was for 4,000 dollars, and the other for 400 dollars, at a very late hour of the night, and was by the officer who took him, carried to the house of the plaintiff's attorney, who was then in bed. Being called up, the defendant requested him to take as bail one *John S. Moore*, who

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was at first refused. But on the defendant's representing the distressed state his family would be in, and the shock it would be to his credit, should he go to jail, the attorney, on receiving his faithful assurances, that sufficient bail should be put in by nine o'clock the next morning, agreed to accept *John S. Moore*, as bail for that night, and the defendant was accordingly suffered to go at large. The defendant, however, instead of putting in satisfactory bail, as he had promised, went immediately on board a vessel that he owned, which was bound for the *West-Indies*, though he knew at the time that *Moore*, who has since been declared a bankrupt, was then insolvent. On this the plaintiff's attorney filed common bail in each of the suits, according to the provisions of the statute; but having been threatened by the plaintiffs with being called on for the amount of their debts,

*Boyd* made the application above mentioned, which, not being opposed, was granted.

*James Jackson, on the demise of Stephen Hogeboom v. John Stiles and Austin Griffin, tenants in possession,*

IN this, and several other actions under the demises from the same lessor, the tenants moved to set aside the rules which had been entered to appear, and enter into consent rules, or that judgment go against the casual ejector.

The notice of motion stated, that the applications would be grounded on an inspection of the declarations, notices and affidavits on file, by which it would

appear, that three of the notices were directed in <sup>Feb. Term,</sup> ~~1804.~~ blank, and one to *James Perkins*, instead of the tenant, *James Kerman*.

*Harrison.* In ejectment, the declaration is analogous to process, and ought, therefore, to be governed by the same rules. If a sheriff were to serve one man with a writ, directed to another, it certainly would not be a legal service, and in ejectment, a notice to A. is not a notice to B. *Kerman* can never be *Perkins*; the court will not permit the possession of one man, to be changed by proceedings against another.

*Woodworth*, Attorney-General, read an affidavit, stating, that *James Kerman* was personally served, and that the declaration, with notices annexed, were served on the tenants. The court will see these facts also, *ante p. 227.* which was an application in this very cause. If the effect of the present motion be allowed, it will, in fact, be to try and decide the cause against the lessor of the plaintiff, as the limitation of the statute will then apply.

*Harrison*, in reply. The effect of the statute cannot be taken into consideration. Suppose trespass for carrying away goods brought, instead of assumpsit, and the six years passed, would the court interfere to prevent the operation of the statute? This case deserves no indulgence; twelve months elapsed before the application to amend in *August* last was made.

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*Per Curiam.* The application in these suits is founded on a reference to the proceedings on file, by which, it is said, it will appear, that one of the notices was misdirected, and the others in blank. In the affidavit on behalf of the plaintiff, it is sworn, that the direction of the one served on *James Kerman*, was to him in his name, and that the tenants were duly served; if the facts were otherwise, it would have been very easy to evince them, by producing the several notices, &c. actually served, without referring to those on file. It is, therefore, to be presumed, that the services have been regular. The court will, in the present case, support this presumption, as otherwise, by the intervention of the limitation of the statute, the plaintiff would be barred. The case of *Reynolds* is very different from this; there no proceedings had been served on him; a different tract of land was claimed; the first intimation he had was by an execution which turned him out, and that very execution against the possession of a different man. We there protected the right of the party, and we do so here. The tenants can take nothing by their motion.

*John Kirby and Edward Kirby v. Edward Watkeys.*

THE defendant had, after due notice, obtained a rule in the last term for a commission, in which the plaintiff did not join, to examine a person in *Port Republic*, and since then had not given any notice of further proceedings under the commission. On these facts

*Harrison* moved to vacate the rule.

*Per Curiam.* Let the rule be so far vacated as to permit the plaintiffs to proceed to trial notwithstanding the commission.

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N. B. On a commission to *England* the court will, after eight months without return, give leave to proceed to trial, notwithstanding the commission; but this does not prevent cause being shown at the circuit, why the trial should not then be put off.

*James Jackson, on the demise of Rosekrans, v. John Stiles, Benjamin Howd, tenant.*

THIS was an action of ejectment, brought to recover lands to which the tenant derived title under the state.

The declaration, &c. had been duly served on the tenant, and by him delivered to the attorney-general on the 14th of April last. The notice was of course for the last *May* term, and the consent rule, and plea were, immediately afterwards, drawn and forwarded to a clerk in the office of the clerk of this court in *Albany*, directed to the attorney for the plaintiff, who the attorney-general believed to reside in or near *Albany*. The consent rule and plea, were duly received, but from inattention in the clerk to whom they were transmitted, they were filed instead of being served. The consent rule, and plea not having been received, the plaintiff took his judgment by default against the casual ejector, sued out a writ of possession, and turned out the tenant. On these facts it was intended to move the court last term to set aside the judgment and writ of possession, and that a writ of restitution

Feb. Term, <sup>1804.</sup> should issue ; but it being inconvenient to both parties to bring it on then, a written agreement was entered into, consenting to postpone the application till this term, and that the delay should not be deemed a laches in the tenant.

*Caines*, on the above facts, substantiated by affidavit, now moved to set aside the default and subsequent proceedings, and that a writ of restitution should issue. There were, he said, but two objections which could be made to the motion. First, that the default was not accounted for ; secondly, that the application ought to have been made at an earlier day. As to the first, this court had allowed the miscarriage of pleas when sent by the mail to excuse a default,\* and though this was not exactly that case, it was within its principle ; for, the defendant's attorney had taken every necessary step in due time. On the second point, the written agreement was a complete answer. In addition to this, no injury could be induced by granting the application ; if the plaintiff had any right, he would, on a trial, be able to prove it ; on the other hand, if the motion was denied, it might be of the utmost prejudice, as it would shut out the defendant from all possibility of showing his title. Besides, the rule was not asked for but on payment of all costs, so that the plaintiff would be where he was, with all his rights, titles, and even his pocket unimpaired.

\* *Hudson v. Henry, ante,*  
p. 168.

*Van Vechten*, contra, read affidavits stating that the lessor of the plaintiff had been duly put in possession of the lands in question by the sheriff of the county, and had, on the same day, granted a lease of

the premises to a third person ; that in conversations with the lessor of the plaintiff, he had acknowledged that he held under the patent of *Clifton park*, whereas those delivered were claimed under that of *Kayaderosseras*, and that the lessor of the plaintiff had acknowledged he believed the premises delivered under the writ, were in *Kayaderosseras*. It was, therefore, insisted, that, as now the right of a third person was implicated, the court would not interfere ; that the title was acknowledged, and it would, therefore, be useless. The excuse of the default was also denied to be similar to the cases relied on.

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*Caines*, in reply. The lease granted since the execution of the writ, and before the signing of the agreement, must have been so recent as to admit of no improvements. The third person, therefore, can sustain no injury. Allowing the right to be with the lessor, still it cannot be thus tried on affidavit. A jury is the tribunal for its determination. In referring it to a jury, he has all his rights, and the expense he has been put to, we agree to pay. He, therefore, cannot suffer ; but the defendant may, as he cannot obtain compensation from the state, unless he shows a defence, to which alone he asks to be admitted.

*Per Curiam.* The proceedings, on the part of the defendant, certainly have not been perfectly regular, for they ought, in strictness, to have been sent to the agent of the plaintiff's attorney. It appears, however, that every measure necessary for the defence was actually taken, though, from an idea on one hand of the clerk of the defendant's attorney,

Feb. Term, that the plaintiff resided near *Albany*, and a mistake  
1804. on the other, in the office of the clerk of the court,  
the papers never reached their proper destination.—  
In ejectment, as it is the creature of the court, every  
thing will be done to promote the justice of the case,  
according to right, and the court will go further to  
protect the possession, when it can be done without  
injury to the plaintiff's claim, than it is willing, in  
other cases, to proceed. As, therefore, there was  
a full knowledge in *October* last, of an intention to  
make this application, and the transactions are all of  
a recent date, we are of opinion, that the default ex-  
tered against the casual ejector, the judgment there-  
on, and the writ of possession sued out, be set aside,  
and a writ of restitution issue, on payment of costs.

*Edmund Kirby v. Samuel Cogswell.*

This was an action on a promissory note by the in-  
dorsee against the maker. It appeared on the trial,  
which took place during the last *Albany* circuit, that  
the plaintiff was one of a firm, and had indorsed the  
note, in the name of the house, to himself, and now  
sued in his individual capacity. On this account, an  
objection was taken, the defendant insisting that the  
plaintiff could not by his indorsement in the style of  
the co-partnership, transfer to himself, in his private  
character, the note so as to give a right of action.—  
This, however, being overruled by his honour, Mr.  
Justice KENT, the defendant, within the time limit-  
ed by rule, made a case, and served it on the plain-  
tiff's attorney: He, observing it to be incorrect,  
made another, detailing the facts accurately, and

also served his, titling it an "amended case."\* On Feb. Term,  
the 8th of November last, being the first day of 1804.  
November term, the plaintiff filed his certificate of trial, *nisi prius* record, with the *postea* indorsed, jury process, and entered a rule *nisi* for judgment. On the 8th of November, the defendant taking no notice of the case intended as an amendment, obtained, on his own statement of facts, a certificate from Mr. Justice KENT, to stay proceedings. This, with a copy of his case, but without any notice of motion, he served the next day on the plaintiff's attorney, observing to him, at the same time, that the amendments, according to the practice of the court, ought to have been proposed and not sent in the shape of a new case. The plaintiff's attorney then offered to make a fair statement, as should be agreed on, alleging his ignorance of the strict rules of making a case. The defendant's attorney seeming to evade this, the plaintiff on the 16th of November served a copy of a bill of costs in the suit, with regular notice of taxation, which he proceeded to execute, signed judgment, and issued a *fieri facias*.

.*Van Antwerp* now moved to set aside the judgment and all subsequent proceedings, insisting that the certificate of the judge was a complete stay, without any notice of motion annexed; for the plaintiff had, as well as the defendant, a right to bring on the argument on the case.

*Per Curiam.* The question is, as to the operation of a certificate of probable cause to stay proceedings. The 4th rule of January, 1799, settles, that,

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at the time of service of the order, it must be accompanied with a notice of motion. The right of the opposite party to notice for argument, does not take away the necessity of notice ; for the mere certificate itself is no stay. The defendant, therefore, can take nothing by his motion, and must pay the costs of the present application.

*Manhattan Company v. Brower.*

THE defendant in this suit being in custody on mesne process, executed a warrant of attorney to confess judgment for the amount of the debt, but it was not witnessed by any person as his attorney, acting in that capacity for him.

*Hoffman*, on this ground, moved to have the warrant of attorney delivered up to be cancelled, and to vacate the judgment entered.

*Hamilton*, contra, read some affidavits, showing that the defendant at the time of executing the instrument, was perfectly well apprised of its nature, which had been explained to him by an attorney, though not actually *his* attorney, or the attorney of the plaintiffs, and that the whole transaction was *bona fide*, and without surprise.

The inclination of the court appearing to be against the application, the proceedings having been within the spirit of the rule relied on ; and, it being suggested at the bar, that it was doubtful, whether the *English* rules of *E. 15 Car. II.* and *E. 4 G. II.* had ever been made a rule of this court, though the prac-

tice was acknowledged to have been in conformity to Feb. Term,  
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*Hoffman* consented to withdraw his motion, and let the judgment stand as a security for the debt, the plaintiffs delivering a declaration, and agreeing to go to trial on the merits.\*

*Stephen Ross and others v. Nehemiah Hubble and Jemima his Wife, administratrix of Ichabod Patterson.*

THIS was a motion to set aside the default entered in the cause, and all subsequent proceedings with costs.

The affidavits contained a variety of unimportant facts, but the only question, worth noticing, which was relied on, was one of practice, whether it was regular to a writ, which was in trespass only, and returned with the names of the defendants indorsed, to enter their appearance in the clerk's office, after judgment was signed.

It was contended that, as the court would order it to be done on application, it was, in fact, doing no more than that, which the court would sanction.

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\* In *Hutson v. Hutson*, 7 D. & E. 8. the court of King's Bench, held that the benefit of the *English* rules referred to, could not be waived by a prisoner, and that the presence of the plaintiff's attorney was insufficient, though acting for the prisoner at his request and entreaty, and though pressed to send for another attorney to witness the instrument, with the nature of which the defendant was perfectly acquainted.

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*Per Curiam.* It is said that no appearance of the defendants, by special or common bail, or an entry of appearance was of record, when the default and judgment were returned. As the process in the cause did not require bail, the defendants indorsed their appearance on the *capias*. It was the business of the clerk, and not of the attorney, to have entered their appearance. This may be done *nunc pro tunc*. The laches of the clerk ought never to prejudice the attorney. We, therefore, deny the motion with costs of opposing.

*Henry Waterbury and another v. John Delafield.*

THIS was the principal suit in several actions on a policy of insurance, in which a consolidation rule had been granted. A commission to examine had been taken out, titled in a consolidated cause; in the commission, the defendant joined and titled his cross interrogatories in the same manner.

*Hoffman* moved to read, in the principal cause, the evidence taken under commission, titled in that which had been consolidated. The court, after some words by *Pendleton*, in opposition, granted the motion, with costs to abide the event of the suit.

*David Gordon, survivor of John Munro and David Gordon, v. Walter Bowne.*

THIS was an application for leave to file the *capias*, and enter the defendant's appearance *nunc pro tunc* as of the last August term.

The facts as they appeared on the several and long affidavits read, were, that the plaintiffs were the assured on a policy of insurance, underwritten by the defendant; that, being in embarrassed circumstances, and unable to meet their payments, they entered into a composition with their creditors, of whom the defendant was one, to pay them, on receiving a release from all demands, fifteen shillings in the pound; ten shillings to be paid by approved indorsed notes, and the remaining five shillings, by their own; the indorsors to receive an assignment of a part of the property of the plaintiff and his partner, by way of security against their indorsements; that in pursuance of this agreement, the defendant received his two notes of ten shillings and five shillings in the pound, executed a release, and the policy in question was assigned to persons for whose benefit the present action was brought; that the note for ten shillings in the pound was duly paid by the assignees of the policy. The attorney for the plaintiff called on the defendant, a few days before *August* term, to inform him of the intended suit, when the defendant assured the attorney, that the matter would be accommodated, and, if not, that he would consent to proceedings being as of *August* term; that a *capias* was afterwards sued out on the second of *August* last, returnable the sixth, but not served till after *August* term, at which time the defendant indorsed his appearance, and as the plaintiff's attorney verily believed, with intent that all proceedings should be deemed as of *August* term; that the declaration was titled as of *August* term, though the *capias* has not been yet filed; that since *August*, the plaintiff has become a bankrupt, and that the defendant had pleaded, giving a notice of setting

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off a note which fell due on the 8th of *September* last, and was the very note for five shillings in the pound given by the plaintiff and his partner, in composition for their debts.

*Hoffman* insisted, that the indorsement of the writ by the defendant, was tantamount to a written agreement, as it was evidence in writing of the agreement, which was further corroborated by the pleadings.

SPENCER, J. delivered the judgment of the court. The defendant resists the application, relying principally on this : That he holds to nearly the amount of the plaintiff's demand, a note against him due on the 8th of *September* last, which he intends to set-off. The object of the plaintiff's motion, is, if possible, to exclude this effect ; on this ground, that his demand is assigned for the benefit of certain persons who have paid debts for him, incurred by indorsements to his compounding creditors. The defendant denies notice of such assignment ; both parties admit the insolvency of the plaintiff. The verbal agreement between the attorney for the plaintiff and the defendant, cannot be attended to ; a rule of this court forbids such agreement being alleged.

There has been laches on the part of the plaintiff, in not entering his suit as of *August* term, and to avoid that laches, the court is now applied to. In granting favours of this kind, the court ought to be careful not to do injustice, and it appears to them, that granting the rule as applied for, might have that effect ; for, most certainly, the defendant's claim to offset, is better founded, than that of the assignees to recover.

Let a rule be entered, that the plaintiff have leave to file his writ, and enter the defendant's appearance, as of the last term.

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THOMPSON, J. I am sorry to be under a necessity of differing from the court; but I think the indorsement of appearance is evidence of an agreement as strong as if it had been reduced to writing, and sufficiently indicatory of the intent of the parties, to avoid any of the consequences against which the rule in question was framed. How far the defendant may, by filing the *capias*, and entering an appearance of *August* term, be precluded from a set-off, or by the present rule entitled to it, is unnecessary to determine. My opinion is, that the plaintiff ought to have the effect of his motion.

KENT, J. I concur in the opinion last given. I deem it a point of moral rectitude to enforce all agreements, when the evidence is such as is not contravened by any rule of law. But as the judgment of the court is, to deny the full extent of the plaintiff's application, he can take no more than has already been pronounced.

*Masters v. Edwards.*

THE defendant had been surrendered in exoneration of his bail, final judgment obtained against him, and after three months, he was, on regular notice to the plaintiff, superseded, for want of being charged in execution in due time. Notwithstanding this, the plaintiff's attorney sued out an execution against the body of the defendant, upon the judgment on which

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1804. he had been in custody, and took him upon the *ca. sa.* thus issued.

*Henry*, on these facts, disclosed by affidavit, moved, that he should be discharged. This case is to be distinguished from that of *Brantingham*: in that, the court held the plaintiff entitled after notice of a rule for a *supersedeas*, to come in, charge in execution, and show that circumstance as a cause for refusing the application. *Blandford v. Foote*, *Cowp.* 72. recognizes the principle of the application. The court there decided, that a man released for want of being charged in execution might be taken on a *ca. sa.* in an action founded on the judgment, in the original suit. It is to be inferred, therefore, that on an execution sued out in the original suit, he could not be taken.

*Benson and Riggs*, contra. The *English* courts proceed on this maxim: "once supersedeable, and "ever supersedeable." This we have departed from, and overruled in *Brantingham's* case. Besides, the whole object of the motion is, to prevent us from doing that directly, which they allow we can accomplish circuitously; for they say, we must proceed by action on the judgment, and have execution in the second suit. This is contrary to the settled principle, that circuitry, and multiplicity of actions are abhorred in the law.

*Henry*, in reply. The doctrine contended for by the plaintiff, would go to shut out, from a defendant, any right of set-off. Suppose a man discharged; in the course of fair dealing, he, by services, or other means, pays a part of the debt; if he is to be taken,

on the original judgment, he is excluded from showing, perhaps, a full satisfaction, till he applies to the court for relief, and during that period is deprived of his liberty.

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*Per Curiam.* In *Brantingham's* case we certainly did depart from the *English* practice. We there allowed, on a rule to show cause, the being charged in execution subsequent to notice of the application, to be shown as a reason for denying the *supersedeas*. The court proceeded there on the idea, that the statute gave the plaintiff a right of electing to have execution against the body, or the goods; and that he was not obliged to manifest this election till called on. The present case is not of that description; the statute was only to prevent double executions. The plaintiff has elected to relinquish the person of his debtor, who, having been once actually superseded, must continue so, and the plaintiff shall never have liberty again to resort to his first judgment. Let the defendant, therefore, be discharged, but without costs.

*Coles, Titford and Brooks v. James Thompson.*

BOYD moved for judgment, as in case of nonsuit, for not going to trial, on an affidavit, that the cause was at issue in *September*, 1802, noticed for trial in *November* following, and has not since been noticed.

An affidavit, contra, was read on the part of the plaintiff, stating, that on the 9th of last *March*, a commission issued to *London* to examine witnesses on his

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behalf, which had not been returned, but was daily expected.

*Per Curiam.* In the cause of *Juhel v. The United Insurance Company*, October term, 1801, we held, that three months was a sufficient time for executing and returning a commission *arrived in London*. In *Miller and Graham v. De Peyster and Charlton*, January term, 1803, it was decided, that where a plaintiff has delayed his own cause by a commission, and it does not appear that due diligence has been used, the defendant may apply for a rule for nonsuit, and compel the plaintiff to stipulate or be nonsuited, as if no commission had issued. In the present case, it does not appear, that the plaintiff has used due diligence in causing his commission to be executed, as eight months elapsed between suing it out and the sittings. Unless, therefore, he stipulate, the motion must be granted.

*Shuter v. Richard S. Hallett.*

A VERDICT had been obtained, in this cause, against the defendant, on which a case had been made, and a judge's certificate of probable cause duly granted.

*D. A. Ogden*, on an affidavit by the plaintiff stating his fear of losing his debt, from the circumstances of the defendant, moved to have the amount recovered brought into court.

*Pendleton*, contra, cited *Hallett v. Cotton, ante*, p. 150.

*Per Curiam.* The practice of the court has never been according to the application. It would be often oppressive, and amount to a denial of right, as the defendant may not be able to comply with the condition, yet have a complete defence to the suit.

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*John R. Livingston v. William Rogers.*

THIS cause came before the court on three several motions, which the counsel upon the argument agreed should be taken, and considered together. The first was a motion by the defendant in arrest of judgment. The second, one by the defendant also, for a new trial on the ground of a discovery of evidence. The third, by the plaintiff, for leave to amend his declaration, by increasing the damages laid, so as to cover the extent of his demand.

The decision of the court was confined to only the first and third motions; and, as it embraces all the points relied on by the counsel, it is unnecessary to give the arguments used.

In support of the motion in arrest they relied on two reasons:

1st. That the several *assumpsits* in the three first counts of the declaration (which was on a stock contract) were void, for want of consideration.

2dly. That there was no record in the office, to warrant the circuit record, by virtue of which, the trial was had.

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The counts complained of, stated the agreement to deliver and receive the stock, and that in consideration the plaintiff had, *at the defendant's request*, promised to perform his part, the defendant *afterwards, to wit, on the same day* promised, &c.

*Per Curiam*, delivered by KENT, J. This is a case of mutual promises, where the one is intended to be the consideration for the other. It is a well settled rule, that in such cases, the promises must be stated to have been made at the same time.\* Otherwise, the one antecedently made will be without consideration, and consequently not sufficient to support the other. The question here is, whether a valid promise is laid, on the part of the plaintiff, so as to form a consideration for that on the part of the defendant. The case in *Hobart* uses the strong language, that the promises must be at one instant, or they are *nude pacta*. It was once held, in *Howlett's Latch.* † that to lay the defendant's promise *afterwards on the same day*, was sufficient; because the court would not allow of any division in a day. But in other respects that case is not altogether applicable. There the defendant's promise was in consideration of an antecedent sale and delivery in part; and the point advanced, of not allowing a division in a day,

‡ *3 D. & E.* 653. is repugnant to the case of *Cooke v. Oxley*. ‡ It was in that decided, that if one party has till a different time of the same day to assent to the agreement, the other party is not held to his prior promise, and the promises are *nude pacta*. It is clear, therefore, from this last decision, and from the reason of the thing, that mutual promises, where one is the consideration of the other, must be made not only on the same day,

but at the same time : they must be concurrent engagements. The plaintiff's promise is here stated to have been made at the request of the defendant. If, instead of a naked promise, the plaintiff had, at the defendant's request done an act, which was either a damage to himself, or a benefit to the defendant, it would have been sufficient to have supported the defendant's promise. An *assumpsit* founded on a past consideration of beneficial service rendered to the defendant at his request, is good. Such are the cases of *Franklin v. Bradell*,\* *Church v. Church*,† and *Stile v. Smith*.‡ The reason that a past consideration, beneficial to the defendant, must be laid to have been done upon request is, that it is not reasonable, that one man should do another a kindness, and then charge him with a recompense. This would be obliging him, whether he would or not, and bringing him under an obligation without his concurrence. In many cases a request§ may be implied from the beneficial nature of the consideration, and the circumstances of the transaction. But in the present case the plaintiff's promise being laid to have been made upon request, gives it no validity from that circumstance ; for the request alone creates not, of itself, any consideration. In addition to the request, there must be something made or done between the parties, beneficial to the one, or onerous to the other. There must either be a consideration executed, or executory. Even one executed will do if laid to have been done upon request. The plaintiff's promise in the present case can be valid only because made in consideration of the defendant's promise ; and if the latter was not made at the same time, but at a subsequent period, the plain-

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\* *Hutton*, 84.  
† *T. Ray*, 260.  
‡ *2 Leon*, 111.  
*Vide also Cro.*  
*Eliz.*, 282.

§ See 1 *Saud.*  
264. note 1 by  
*Williams*,  
*Serjt.* who  
has collected  
the law on  
the subject of  
assumptions  
laid upon re-  
quest. See  
also 1 *Fonb.*  
386. and *Hob.*  
106.

Feb. Term, 1804. tiff's promise was without consideration and void. I

am of opinion this is the just and necessary conclusion in this case; for the promises are not laid as concurrent, but as made at different times. The case of

\* 2 Stra. 933. *Hayes v. Warren*,\* I regard as perfectly in point.

That was an action on the case upon promises, and after judgment by default and entire damages, it was alleged, in error from the common pleas to the king's bench, that on the fourth count, which was for work and labour done, the consideration was laid as past and executed, and not to have been done upon request. Although the work and promise were both laid on the same day, it was held that it must be taken to be a past consideration, as it was stated that "postea" he promised; and the judgment was reversed. The work and labour here were beneficial to the defendant, but not being laid to have been done upon request, the court would not declare it so.—They seemed, however, to doubt whether a request might not be inferred from some other expressions in the count, and rather intimated, that had the judgment been after verdict, the request might have been inferred. But there appeared to be no doubt, that the defendant's promise, by being laid as being made afterwards, although upon the same day, was to be deemed subsequent, so as to render the plaintiff's act, a past and executed consideration. In a case in

*Burrows*† this decision is pronounced by WILMOT, J. to be absurd. It was not, however, on the ground that the consideration was not justly deemed as executed, but because, in his opinion, according to the cases I have mentioned, a past beneficial consideration, with circumstances to imply a request, was sufficient to support the promise. The case, there-

† *Pillans v. Van Mierop*,  
3 Burr. 1671.

fore, for the purpose that I cite it, stands unimpeached, and is conclusive on the question. If we consult the precedents of declarations\* upon mutual promises, they uniformly state the promises to be concurrent; that when the plaintiff had promised, the defendant in consideration thereof, *then and there* assumed upon himself. From hence I conclude, that the promises in the three first counts of the declaration, are not laid as a sufficient consideration for each other; because they are not stated to have been made concurrently, or at the same time, but at different times of the same day. According to the decision in *Strange*, and according to common understanding, the meanings of the expressions "afterwards" and "at the same time," are totally distinct. The last count is good, but the damages being entire,† the judgment must be arrested. The case of *Crosby v. Adams* and *Bellamy*, decided in this court in *July* term, 1795, and afterwards reversed upon error, is stated also to be in point. The counts in that cause were precisely the same, as to laying the time of the mutual promises, and if the court of errors went upon the same objection, that I have been considering, as was suggested in the argument‡ of this cause, that decision is sufficient to uphold this opinion. Though it is not now necessary to consider the want of a record authorising the trial, which was urged as another ground for arresting the judgment; yet, as connected with the other, it may not be inexpedient to notice it. It appears, from the record, that on the first trial a verdict was given for the defendant, and an exception taken to the opinion of the judge. That upon the removal of the cause into the court of errors, the judgment of this court in favour of the defend-

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\* 3 Mor. Va.  
Mc. 142. 2  
Rich. C. P.  
73.

† 3 Wils. 185.  
Comp. 276.

‡ By Benson,  
who was at  
that time on  
the bench.

## CASES OF PRACTICE

Feb. Term, 1804. ant, was reversed, a *venire de novo* ordered, and the record was remitted back to this court. This order of the court above was correct. Not having the record before them, but only a transcript of it, they could not of themselves, award a *venire de novo* but agreeably to the *English* precedents, they very properly adjudged that the court below should make such an award.\* This is all that appears before us.

\* 2 Saund. 101. v. 1 D. & E. 783. 4 Bro. Pa. Ca. 288. 1 Lill. Ent. 243. Trel. 76. Cro. Jac. 206. 1 Salt. 403. 1 Ld. Ray. 10. Cart. 319. Skin. 514. 2 H. Black. 211.

This court never has made an award of a *venire de novo* in pursuance of the direction of the court of errors. The second trial was consequently without any authority, and in my opinion, altogether null and void. There certainly never was an instance of a new trial had without any award by the court for the same, and without any record of such award, and such new trial held good, merely in consequence of the appearance of the defendant. A defect of record is moveable in arrest of judgment,† and is a deficiency that is not in any shape amendable. Irregularities in the contents, or in the execution of jury process are amendable. The process is amendable by the roll, and the circuit record is amendable by the issue roll. So mere continuances may be entered after judgment, but no case ever came up to the present. In this there was a trial without any award for it whatsoever, either upon the record or the minutes of the court. The circuit judge had no authority to try a second time the matter in issue on the issue roll ; without an award of a *venire de novo* by the court.—There are cases were a trial has been held void, because the *venire* was not warranted by the roll, and the cause was tried by a different jury than that which

† 1 Roll. Abr. 200. pl. 27. Bac. Abr. tit. Amendment. (D.) 4. lib. tit. Juries. 3.

the record directed.‡ To hold this amendable in the present case, would be unprecedented, and in my

‡ Latch. 194. Hob. 76.

opinion, would tend to the abolition of all regularity, form and order in our practice and judicial proceedings. I hold it essential, that it should be made to appear, that previous to the last trial there was an order for a *venire de novo*, the court of errors not having of themselves made such an order, and not having the authority to do it. As then the second trial was without any award of a *venire*, it was an absolute nullity, and the judgment must be arrested, unless the party choose to move to award a new *venire*. As there is one good count in the declaration, the plaintiff may, if he choose, on the first ground, sue out a *venire de novo*, and may also amend his three first counts by striking\* out the words "*afterwards, to wit,*" being the ground on which the judgment ought to be arrested. This, however, must be on payment of costs since declaring. On the point of amending by enlargement of the damages laid, the court† is divided, consequently the plaintiff in this respect takes nothing by his motion.

*Peter Delamater v. James Borland.*

\* Consisting  
of only Kent  
and Thompson,  
Justices,  
no others giving  
any opinion.  
† 56.

IN error on a *certiorari* from a justice's court. The declaration was for ten dollars, deposited in the hands of the defendant below as a stake on a wager. The demand at the trial was for 25 dollars due on a note, on which five had been paid, and the judgment was for fifteen dollars.

*Per Curiam.* It appears that the plaintiff below declared for one thing, and gave evidence of another totally variant. To this the defendant made an ob-

Feb. Term, 1804. jection, which was overruled. In the next place, the declaration is for ten dollars, and the judgment for fifteen. Both errors are fatal, and there must be a reversal with costs.\*

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\* The multiplicity of cases from the Justices' Courts will excuse the insertion of the following determination, by which it was decided, that they have no jurisdiction under the joint debtors act.

*Josiah Jones and Josiah Crawford v. David Reid.*

JANUARY TERM, 1799.

*Per Curiam.* It is a clear and salutary principle, that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show the power expressly given them in every instance.

The sound rule of construction, in respect to justices' courts, is accordingly this : to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute.

To apply these principles to the present case :

The act making joint debtors answerable to their creditors separately, and giving a new mode of proceeding, is posterior to the act granting civil jurisdiction to justices of the peace, and makes no mention of them. It directs that process shall issue against the joint debtors in the manner then in use, and if either be taken and brought into court, he shall answer. This act contemplates, in every instance, a compulsory process on which the defendant is taken and brought into court and until that be done the court cannot proceed in the cause ; whereas, the ten pound act, giving civil authority to justices, intends only a summons in the first instance against freeholders and inhabitants, having fami-

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## MAY TERM, 1804.

*John R. Livingston v. the Columbian Insurance  
Company.*

BOGERT, in behalf of the defendants, moved for a struck jury in this cause, on an acknowledgment from the attorney of the plaintiff of service of notice of the motion, but this was not accompanied with any affidavit of the importance or intricacy of the cause.

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lies, and if the summons was personally served and the defendant does not appear, the justice cannot compel him, but is to proceed and try the cause without his being either taken or brought into court. The joint debtor act, accordingly, gives a power and jurisdiction different from and unknown to the ten pound act. So in respect to executions the joint debtor act directs, that the execution shall be against all the debtors; but shall not, however, issue against the body or sole property of the one not taken and brought into court. Whereas, by the ten pound act, execution is directed to go against the entire goods and chattels of the person against whom it is granted, and for want of sufficient goods of such person, to take his body. Here are new powers and new modes of proceeding, applicable to the courts of common law, and contrary to the express forms and directions given to the justices' courts, and in which no mention is made of them.

We are, therefore, of opinion, that, according to the settled rules of interpretation, justices of the peace have no jurisdiction in the case of joint debtors, unless both are duly served with process, and, therefore, that the judgment in this case must be reversed.

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*Per Curiam.* The court ought to be satisfied that the cause is either intricate or important,\* and that by affidavit.

\* *Vide Spencer v. Sampson, ante, p. 511.*

N. B. The court seemed inclined against the granting of struck juries, as a matter of course, on a mere formal affidavit.

*Selah Strong and others v. Zebulon Smith.*

† *1 Rev. Laws, 491.*

‡ *Ibid. 494.*

THIS was an action of trespass commenced before a justice of the peace in the county of *Suffolk*, under the "Act for the more speedy recovery of debts to the value of twenty-five dollars."† The defendant justified under a plea of title. Upon this, proceedings were stayed before the justice pursuant to the tenth section of the act,‡ and the action prosecuted before the court of common pleas; from thence the defendant removed it by *habeas corpus* into this court, where he pleaded, 1st. The general issue. 2d. That the closes mentioned in the declaration, were the freehold of the trustees of the freeholders and commonalty of the town of *Huntington*, and that by their command and direction, he entered. 3d. That the trustees of the freeholders of the town of *Huntington* were seised of the premises, and granted him a lease for a year, by virtue of which he entered and was possessed until the plaintiffs, by colour of title, turned him out, on whom he again entered, and committed the trespasses complained of. A suggestion of these circumstances, according to an intimation on a former day given by the court, having been entered

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on the record, an application was now made to compel the defendant to strike out his plea of the general issue, and rely on his title only.

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1804.

*Riggs*, for the plaintiff. *Sanford*, for the defendant.

*Per Curiam.* The construction of the act no doubt is, that when a defendant, sued for a trespass before a justice, relies on his title, he admits the trespass. But lest the title should be in a third person, the act gives him a right to show that also. Either one or the other acknowledges the trespass. To this, as the whole matter appears on the record, it would not be permitted the defendant on the trial of  *nisi prius* to say the contrary, nor would the plaintiff be called on to prove the trespass done. The general issue, then, is perfectly nugatory, and must be struck out, but not with costs.

SPENCER, J. dissentient.

*Cornelius J. Roosevelt v. Daniel Kemper.*

THE plaintiff had in this cause taken an inquest at the last circuit, the judge laying it down as a general rule, that any party might take an inquest, but at his peril.

*Harrison* moved to set aside the inquest on a simple affidavit of merits.

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1804.

*Per Curiam.* Whenever an inquest is taken, it is at the risk of the plaintiff; and on such an affidavit as the present, must set aside with costs.

N. B. The court seemed to intiate, that counter depositions of a want of merits could not be received, as it would be trying a cause on affidavits.

*Frederick Depeyster v. Willett Warne.*

HARISON moved to set aside the default, interlocutory judgment, and all subsequent proceedings, on affidavits of the defendant's attorney and his clerk, stating notice of retainer served at the office of the opposite attorney, which was acknowledged to have been received by a person then in the office of the plaintiff's attorney, and acting either as clerk, agent or partner, and also setting forth service of notice of special bail having been filed, an entry of which, and of service of retainer, was made in the register of the deponent.

EVERTSON opposed the application on an affidavit made by himself, stating the debt to be on a promissory note, in which there was no defence, and that if the defendant could make any, he had several times offered to give up the judgment. That the person mentioned in the affidavits on behalf of the defendant as being a clerk, agent, or partner, was neither the one nor the other; that neither the defendant nor any of the clerks knew of any person being retained as an attorney for the defendant, though in the regis-

ter of the deponent, was entered a receipt of a ser. vice of notice of bail. That the defendant was in execution, and an insolvent. From these circumstances, and because the defendant had not sworn to merits, it was contended that the default and proceedings ought to stand.

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*Per Curiam.* There is strong reason to believe that notice of retainer was duly served, and though no merits are sworn to, we cannot depart from our rules. Let the default, judgment, and all subsequent proceedings be set aside with costs ; but on condition that the defendant does not bring any action for false imprisonment.

*Valentine Baker and Gerard S. Sloane v. Henry Sleight, Esq. Sheriff of the County of Ulster.*

EVERTSON, on an affidavit not specifying the ground of action, moved to change the *venue* from the county of *Dutchess* to that of *Ulster*.

Hopkins opposed it on a counter affidavit, stating a belief, that in consequence of the influence the defendant possessed in *Ulster*, from his office, a fair and impartial trial could not be had there. He insisted also on the defectiveness of the plaintiff's affidavit, in not setting forth the ground of action, and that it ought, therefore, to be presumed, it was not a transitory suit.

*Per Curiam.* The court cannot intend, that the action is not transitory, it ought to have been shown

~~May Term,  
1804.~~ by the defendant, and the influence of a sheriff's office, never can prevent an impartial trial. Take your rule.

*Aaron Pell v. George Bunker.*

IN this cause *Hawes* moved to vacate, in part, a commission sued out in *November* last, so as to go to trial notwithstanding, at the next circuit.

*D. A. Ogden* opposed it on the ground, that eight months had not elapsed since it was issued, and relied on this as the established practice, in cases of commissions to *Europe*.

*Per Curiam.* Granting the motion will do no injury; the time may or may not elapse before the cause is brought on, and it does not prevent, even then, the showing of cause further to postpone the trial.

*Cotes, Titford and Brookes v. James Thompson.*

THE court had the last term denied a motion for judgment, as in case of nonsuit for not proceeding to trial, on the plaintiff's stipulating to try at the last sittings for the city and county of *New-York*, nine months having elapsed since issuing the commission in the cause. The plaintiffs not having proceeded agreeably to that stipulation,

*Boyd* moved again for judgment as in case of nonsuit.

*Munro*, contra, read an affidavit, stating the commission to have been mislaid by the defendant's commissioner; it is now found, and is shortly expected to be returned.

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*Per Curiam.* The motion must be refused; but the plaintiff must pay costs and stipulate anew.

*Anonymous.*

THE court intimated that when a stipulation is offered, before notice of motion, then costs will be allowed up to the time of offer. When after notice, and before actual application, up to that time. But when not till the court is applied to, then all costs must be paid.

*Anonymous.*

IT was ruled by the court, that to take the effect of a motion for judgment, when a frivolous demur-  
rer is put in, notice of bringing on the argument must be given.

*The President and Directors of the Manhattan Company v. Stephen Miller.*

THIS was an action on a promissory note in which the plaintiff had duly appeared by attorney, and the defendant pleaded a judgment recovered. To this the plaintiffs replied; but in their replication began, "And the said *President and Directors of the Man-*

May Term,  
1804. " *Hastan Company* say," &c. without mentioning by attorney, and so went on negativing the whole plea, without having their replication signed by counsel, concluding to the country,\* and adding the *similiter* on which they went to trial and took an inquest.

\* See *Sandford v. Rogers*, 2 Wils. 113. 2 Tidd's Prac. 673.

See also *Espin v. Smal-*  
*let, Say. 208.*

*Woods*, on an affidavit stating these facts, moved to set the inquest aside, for irregularity.

*Bogert*, contra. The replication is in the usual form. It is a mere negation of the plea, without alleging any new fact, and therefore not a special pleading. Besides, the name of a counsel is indorsed on the back.

*Per Curiam.* There was no occasion for a counsel's hand; unquestionably the plea is not special. If it was, there is the name of counsel indorsed. Besides, had it been so, it ought not have been retained. Let the defendant take nothing by his motion, and pay the costs of resisting the application.

#### *Simonds v. Catlin.*

THIS was an ejectment for lands in the county of *Onondaga*.

Upon the trial the plaintiff produced the exemplification of a *judgment* of this court, in the cause of *Levi Barker*, against the defendant for debt, and entered of the term of July, 1800, in which cause the *venue* was laid in *Albany*. He further produced the exemplification of a *fi. fa.* directed to the sheriff of

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*Onondaga*, and tested the 9th day of *August*, 1800, ~~May Term,~~  
~~1804~~  
commanding him to levy the debt and costs of the above judgment, and which execution contained an indorsement of being received by the sheriff on the 4th of *October*, 1800. It also contained a return annexed, in the words following, viz.

" I, *Levi Sherman*, under sheriff to *Elnathan Beach*, Esq. late sheriff, deceased, do, in pursuance of the law, and in consequence of the death of the sheriff, return, that the said sheriff sold at vendue, all that farm or tract of land in the town of *Pompey*, in the said county, in the occupancy of the defendant, some time in *January*, 1801, and before the 15th, to one *Ebenezer Butler*, junior, he being the highest bidder, for 26 dollars. That the said Butler did not pay the money for the same; and by order of the said sheriff, I did, on the 22d day of *January* aforesaid, expose the said land to sale again, and that *Joseph Simonds* purchased the same for 50 dollars, he being the highest bidder. That the said sheriff died on the evening after the vendue last aforesaid, and before the said writ was returned. And I, the said under sheriff, do make this return, this 23d *January*, 1801.

" *Levi Sherman.*"

The plaintiff further proved, that the defendant, at the time of the sale, and at the commencement of the suit, was in possession of the premises. The defendant then moved for a nonsuit, and was overruled. He then offered to prove that the sale to *E. Butler*, junior, was not a ready-money sale, but at a credit, and that *Butler* had always been ready to pay, and that the sa-

May Term, <sup>1804.</sup> cond sale was made at the solicitation of the lessor of the plaintiff, who was the attorney in the original cause, without any notice by advertisement, and on his indemnity to the sheriff, who was then on his death-bed, and incompetent to attend to his business, and that the lessor of the plaintiff knew of the previous sale. The defendant further offered to prove, that the indorsement on the execution was made in *May*, 1802, at the request of the said lessor ; but the testimony was overruled. The defendant then offered in evidence, a deed from the said *Elnathan Beach* to the said *Butler*, for the premises, in pursuance of the first sale, bearing date the 7th day of *August*, 1801, and to which deed was annexed a certificate of proof of the same before a master, by the acknowledgement of the said *Levi Sherman*, that he executed the same, in the name of the said *Beach*, and as under sheriff to the same, the said *Elnathan* being dead, which evidence was likewise overruled, and a verdict taken for the plaintiff.

Upon this case, a motion was made to set aside the verdict, for these reasons : 1. That a *fi. fa.* issuing into a different county than that in which the *venue* was laid, without a *testatum* is void. 2. That the *fi. fa.* bore test out of term. 3. That there is no deed from the sheriff to the plaintiff. 4. That the return of the sale contains evidence of a void sale. 5. That the evidence offered at the trial ought to have been received.

*Per Curiam*, delivered by KENT, J. The two first objections go to the *form* of the execution, and considering the circumstances attending this case, the

plaintiff ought, in justice, to be held strictly to a legal title. He was the attorney who sued out the execution, and the second sale was made on short notice, if indeed any notice was given, and he himself became the purchaser. The plaintiff is, therefore, properly chargeable with notice of every irregularity attending the execution. Prior to this motion, a rule was granted to amend the *fi. fa.* by making it a *testatum*, but as the rule was granted upon the express condition of being without prejudice to the objection to be raised in this case, and which was then pending for argument, the court are justified in putting the amendment out of view. And there can be no doubt, but that the *fi. fa.* ought to be set aside for irregularity, on the ground of the first objection, as the cases of *Allen v. Allen*, and *Brand v. Mears*,\* go that length even after execution executed.

\* *Black. Rep.*  
697. 3 D. &  
E. 388. See  
also *Barnes*,  
209.

The second objection to this *fi. fa.* that it bears test out of term, is equally well taken.† The process for that reason, is held to be void, and the party suing it out, cannot take advantage of it, although it may justify the sheriff, and if the case be within the reach of an amendment, yet as the amendment must always be a matter of sound discretion, I should not be inclined to grant it in the present case, for the reasons I have suggested.

† 2 *Salk.* 700.  
7 *Mod.* 30.  
*Latch.* 11. *T.*  
*Jones*, 150.  
1 *Stra.* 137.  
138.

The next objection goes to the *merits* of the case, and is founded on the want of a conveyance from the sheriff. This is a question of importance and difficulty. It has been attended with doubt and embarrassment in my mind, but I have come to the opi-

May Term, 1804. nion, that the estate of a defendant, cannot pass at a sheriff's sale, but by deed or note in writing, to be signed by the sheriff, as the party or agent who passes the estate.

The act directing the sale of real estates on execution is silent, as to a conveyance from the sheriff; and yet a conveyance upon such sales, is dictated by the same policy that applies to all other alienations of land. Without a deed or note in writing, there would be no written document of the sale; for, in the first place, it is not requisite to the validity of the proceedings on execution, that the writ should ever be returned: nor is it requisite, even if a return be made, that the sheriff should specify with certainty the particular lands sold, or the name of the purchaser. It would be sufficient to state, that of the lands and tenements of the defendant, he had caused to be made the debt and damages specified in the writ, as he was thereby commanded. If, therefore, the estate passes upon the sale, without any writing whatever, the general policy of the law would, in this instance, be contravened, and would be productive of manifest public inconveniences. In the county where the lands in question lie, every conveyance, whereby any lands in that county may be any way affected in law, or equity, shall be deemed void against any subsequent purchaser or mortgagee for valuable consideration, unless recorded.\* The present case is not within the act, because here is no subsequent purchaser to contend with, but cases of that kind must often arise, and if sheriffs' sales be not within the provisions of the act, it would work very great imposition and fraud. A purchaser would go to the records, and if he found no convey-

\* 2 Rev.  
Laws, 263.

ance from the defendant, he would naturally conclude <sup>May Term,</sup>  
 he might purchase in safety. But if a sheriff's sale <sup>1804.</sup>  
 is to defeat him, he would in vain seek for the evi-  
 dence of it. The purchaser from the sheriff, has  
 nothing to show. There is even wanting the livery  
 of seisin, which, in the simplicity of ancient times,  
 and before writing was much in use, was held indis-  
 pensable to the transfer of an estate. He could only  
 ascertain the fact of the sale by the sheriff, from  
 searching after and examining those who may hap-  
 pen to have been eye-witnesses of the transaction. I  
 cannot think that the law intended to induce such in-  
 convenienc<sup>e</sup>, and uncertainty. If we were to judge  
 of the sense of the legislature from the various other  
 cases in which the law is explicit; and which are cases  
 in *pari materia*, it would leave no doubt on this ques-  
 tion. All sales by the *surveyor-general* at auction,  
 by order of the commissioners of the land-office ;  
 sales of land by order of the *court of probates*, for  
 payment of debts ; sales at auction by loan-officers,  
 of lands mortgaged to them, and sales by *sheriffs for*  
*quit rents*, by virtue of process from the exchequer,  
 (and this last is a case perfectly analogous to the pre-  
 sent) are required to be completed by a formal con-  
 veyance from the public offices. It appears to me  
 that sheriffs' sales must be within the statute of  
 frauds, which declares that no estates of freehold, or  
 terms of years shall be granted, but by deed or note  
 in writing, or by act and *operation of law*. I need not  
 undertake to show that a sheriff's sale is not an act  
 and *operation of law*, within the meaning of this sta-  
 tute. These words are strictly technical, and refer  
 to certain definite estates, such as those by the cur-  
 tesy and dower, or those created by *remitititur*. It has

<sup>1 Rev. Laws,</sup>  
 274. 280. 289.  
 295. 298. 9.  
 302. 324. 610.

<sup>1 Rev. Laws,</sup>  
 79.

**May Term, 1804.** been said by Lord *Hardwicke*,\* that a judicial sale of an estate, took it entirely out of the statute. The reason why it is out of the statute, I do not so well comprehend ; it is not because the sale is *at auction*, for it is settled, that those sales, if they relate to *land*, are within the statute of frauds. Nor does a sheriff's sale appear to me to be *in its own nature* free from all danger of introducing fraud or perjury, and so, not within the mischiefs intended to be prevented by the statute.

**1 Bos. & Pul. 307. 1 Esp. 101. 1 Powell, 271, 2.** The case in which Lord *Hardwicke* is said to have ruled as broadly as I have stated, is quite obscurely reported. The agreement must have been made before the master, or acquiesced in, in court ; and it seems to have been more like a consent upon record, than any thing else. At any rate, I cannot consider that observation in chancery, as a sufficient authority to set aside the plain letter of the statute.

I apprehend the general practice has been different ; and, that upon sales, under the direction of a master in chancery, as well as sales by sheriffs at law, the sale has uniformly been consummated by a conveyance.

This general usage ought to have great weight in a case where a statute is susceptible of two constructions ; and especially, when the literal interpretation, and perhaps the reason of the thing, are in favour of the construction adopted in practice.

The minute provisions in our statute regulating sales on execution, and even the facts in the very case

before us, are sufficient to show, that these kinds of sales, are equally within the danger of the mischiefs which the acts ought to prevent. The court of chancery itself has latterly admitted,\* that it had gone rather too far in permitting part performance and other circumstances, to take cases out of the statute of frauds. I am of opinion, therefore, that a sheriff's sale is within the statute of frauds.

There was an ancient principle of the common law that would, if it applied, have superseded the necessity of a deed. It was a rule, that where a thing took effect out of a naked *power or authority*, it was good without deed; but where a thing took effect out of an interest, there it must be by deed, if incorporeal; and by livery, if corporeal. In pursuance of this rule, it hath been held, that if executors be ordered in a devise to sell land, they may do it by deed, or by parol, because the vendee takes under the devise, and not under the conveyance of the executors; according to the principle, that whoever claims under the execution of a power, must make title under the power itself. Whether this principle would, or would not have applied to the present case, I need not now examine, for admitting that it did, I am satisfied that the statute of frauds has done it away. The only remaining inquiry upon this head is, whether the return of the under sheriff was not a sufficient *deed or note in writing* within the act? But there are several objections to this return. In the first place, it is not, in pursuance of the statute, a return in the *name of the sheriff*. It is expressly a return in his own name. When a

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man acts in contemplation of law, by the authority and in the name of another, if he does an act in his own name, although alleged to be done by him as attorney, it is void. In the case of *Frontin v. Small*, the attorney executed a lease in her own name, although stated to be made for, and in the name of the principal, and the lease was held to be void, because made in her own name. This case was recognized as good law, so late as the case of *Wilks v. Back*. This return is not, therefore, an act of the sheriff, of which we can take notice. But admitting it to have been made in the name of the sheriff, it could not be a sufficient deed, or note in writing of the sale, because it has not the requisite certainty. It does not appear what estate was sold, whether an estate for years, for life, or in fee, nor is there any certainty as to the thing sold. It is stated to be *all that farm, or tract of land in Pompey, in the tenure and occupation of the defendant*. But there is no kind of estimation of the quantity of land sold, nor in what part of the town it lays, or how marked and bounded. I do not mean to be understood to say that a note in writing of a sheriff's sale must be precise as to the quantity of acres, and as to the metes and bounds, but the thing sold, must in all cases be specified with so much precision as from the description it can be reduced to certainty, and especially in the case of sheriffs' sales; for it was decided, *Jackson, ex dem. Jones, v. Striker*,\* that at such sales, no property could pass but what was, at the time, ascertained, and declared. This appears to me to be an excellent rule to prevent fraud and speculation at such sales, and I should be sorry to see it impaired.

\* Oct. term,  
1799.

A general sale by the sheriff, of all that tract of land in the town of Pompey, in the tenure and occupation of the defendant, does not appear to me to comport with the rule. It might as well have been all that tract of land in the county in his possession. I am of opinion, a more definite description of the situation and amount of the land, and of the quantity of the defendant's interest therein, ought to have been stated, and that the evidence of this sale, even admitting it to have been duly made by the sheriff, has not the requisite certainty.

In *England*, when the sheriff extends lands by *elegit*, he returns an inquisition, specifying the farm, the number of acres, the metes and bounds, the value, &c. Yet the statute of *West.* 2. 13 *E. I. c. 18.* which gave the *elegit*, only required in general, that the sheriff deliver one half of the defendant's land, until the debt be levied upon a reasonable price or extent. If, however, all the objections hitherto raised, had been surmounted, I am of opinion that the evidence offered on the part of the defendant at the trial, ought to have been received, to show the sale was fraudulent and void. The evidence went to show, that the first sale was valid and binding, and had been carried into effect by a deed from the sheriff. That the second sale was made, at the solicitation of the plaintiff, without any notice by advertisement, and on his indemnity to the sheriff, who was then on his death bed, and incompetent to do business. These circumstances ought to have been left to a jury, to draw

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such inference from them, as the case required, and it is not to be disputed but that the whole sale may be rescinded on the ground of fraud. For these reasons, I am of opinion the verdict ought to be set aside, with costs to abide the event.

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### AUGUST TERM, 1804.

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#### *Cyrus Jackson v. Rodolphus Mann.*

HENRY moved for judgment, as in case of nonsuit, for not proceeding to trial, and also for costs of the last circuit, and those formerly ordered, on an affidavit, stating a similar motion in a former term, in which the expense of witnesses only, was allowed, as the cause had been countermanded by consent; that these costs had been demanded and not paid, after which the cause was again noticed, but neither the plaintiff nor his witnesses attending at the circuit, the defendant requested that he and his witnesses might be discharged, which, however, the plaintiff's attorney absolutely refused.

*Van Yeveren*, contra, read an affidavit, setting forth that the plaintiff had duly subpoenaed one *Obadiah Phelps*, his principal witness, but that he did not attend, and was, as the deponent verily believed, kept away by the contrivances of the defendant. He in-

sisted also, that as notice of trial for the last circuit was accepted, the defendant had waived his right to the former costs. If the court should be against him on these points he hoped they would grant an attachment against *Phelps*, whose contempt in disobeying the subpoena, was the cause of not proceeding to trial.

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1804.

*Per Curiam.* The absence of the plaintiff's witness is sufficient to induce us to refuse the application for a nonsuit, and even to excuse him from stipulating; but as he is in contempt for not paying the costs formerly ordered, let him pay those of the last circuit within twenty days after due demand; in default thereof, the defendant to be at liberty to enter up judgment as in case of nonsuit. As to those costs, which on the former occasion were allowed, we do not take them into consideration, the defendant having it in his power to enforce them by attachment; and with respect to the attachment prayed for by the plaintiff, it is not usual to grant one in the first instance, unless some wilful disobedience to the authority of the court is made to appear; the plaintiff, therefore, can have only a rule to show cause.

*James Jackson, on the demise of David Van Bergen  
and others, v. Samuel Haight.*

SCOTT, on an affidavit stating that this cause had been duly noticed for the three last circuits, and that younger issues had been tried, moved for judgment as in case of nonsuit, for not proceeding to trial at the last circuit in *Green*, pursuant to notice.

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*Champlin* resisted the application, on a deposition setting forth that the papers necessary for the defence had been left with him for eight months previous to the circuit, to use at the trial; but that they had been, two weeks before it was to have been held, taken from him by the person from whom he had received them, under a promise to return them before the time the cause would come on. That the title depended on the *Catskill* patent; from the great length of the documents, and exemplifications in which, the expense of copies was so great, as to render the saving it an object of importance. That in all other respects the defendant was ready for trial, and now relied on these circumstances being received as a sufficient excuse.

*Scott*, in reply, urged that the benefit of the papers might have been had by a subpoena *duces tecum*.

*Per Curiam.* We think the excuse sufficient to prevent a nonsuit, but not to relieve from costs; let, therefore, the defendant take nothing by his motion, on the plaintiff's paying costs, for not bringing the cause to trial at the last circuit.

*Solomon Chandler and wife v. William W. Trayard.*

SCOTT endeavoured to bring on, as a non-enumerated motion, an application for a new trial in this cause, on an affidavit of newly discovered evidence.

*Per Curiam.* It is clearly an enumerated motion, <sup>Aug. Term,  
1804.</sup> and cannot be heard this day.

*Jackson, ex. dem. John L. Norton and others, v.  
George Gardner.*

VAN VECHTEN moved on the common affidavit for judgment, as in case of nonsuit, for not proceeding to trial, but the affidavit of service stated only, that it was made by leaving copies on the table of the attorney's office, about one o'clock in the afternoon.

*Per Curiam.* The affidavit is defective ; it does not set forth that there was no one in the office. The notice might have been slipped down without any intimation, and have remained there unobserved. To make such a service good, it ought to have been stated there was not any one in the office. The defendant can take nothing by his motion.

*Casparus Bain v. David Thomas and James Green.*

RUSSEL moved for judgment as in case of nonsuit.

*Blanchard* resisted the application on an affidavit stating a conversation, which he considered as an agreement to waive the irregularity.

*Russel* wished not to rely on the rule respecting written agreements, could the conversation be substantiated.

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*Per Curiam.* The court cannot take notice of agreements between attorneys, unless reduced to writing. If it is intended to waive the rule on this subject, the motion must be withdrawn; otherwise judgment of nonsuit must be entered, unless the plaintiff stipulate and pay costs.

*Beriah Palmer, Philip H. Schuyler and Joshua Nelson v. Amos Mulligan, Herman Moody, Noadiah Moody and William Gates.*

VAN ANTWERP, on the common affidavit, moved for judgment as in case of nonsuit, for not proceeding to trial.

Woodworth, contra, stated that this was one of two causes depending on the same point. That in the other, a verdict had been given against the plaintiffs, contrary to the opinion and charge of the judge before whom the cause had been tried, for which reason the present suit had not been brought on, and a case was made in that which had been heard, and was now before the court.

Van Antwerp, in reply. A case ought to have been made in the other cause. As it has not been done, it is a waiver of intention to rest on the point in the other: the plaintiffs must, therefore, pay costs and stipulate, or we must have have our judgment.

*Per Curiam.* You are entitled to costs, but as there is a sufficient reason for not proceeding to trial, we shall not oblige the plaintiff to stipulate.

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SPENCER, J. I think they ought to stipulate. Aug. Term,  
There is a verdict in favour of the defendants which, 1804.  
till the contrary is shown, we ought to think correctly given.

*Nicholas Bradt v. Bethuel Way and Hannah his Wife.*

VAN ANTWERP moved for judgment as in case of nonsuit, for not proceeding to trial according to notice.

*Van Yeveren* read an affidavit stating, that previous to the circuit, arbitration bonds had been entered into by the parties in the suit, and an award made.

*Per Curiam.* Let the defendant take nothing by his motion, and pay the costs of resisting this application.

*N. B.* It seems that wherever the affidavits contra, disclosed circumstances that clearly show the application noticed will be ineffectual, costs for resisting will follow the denial.

*Jared Stocking v. Elliot Driggs.*

ERROR on a *certiorari* upon a judgment in a justice's court.

From the return, it appeared that the action below was brought against the now plaintiff, as the

Aug. Term, <sup>1804.</sup> maker of a promissory note for 20 dollars ; that after a plea of non-assumpsit, the defendant below prayed an adjournment, which being granted, the plaintiff, *Driggs*, appeared on the day given. The record then went on thus : " And the defendant not appearing, although solemnly called, I, the said justice, proceeded on the *producing the said note* by the said plaintiff, and gave judgment for the plaintiff " on the said note, for the sum of," &c.

*Williams*, for the plaintiff.

*W. Van Ness*, contra.

*Per Curiam.* The judgment ought to have been "on hearing the proofs and allegations" \* of the parties. The judgment must, therefore, be reversed, for it was error in the justice to give judgment till he had proof of the note.

*The People v. the Judges of the Court of Common Pleas in and for the County of Washington.*

EMOTT moved for an attachment against the defendants for not obeying a peremptory *mandamus*, commanding them to sign a bill of exceptions.† The affidavit did not state the service to have been when the court was sitting, or the persons on whom made.

*Champlin*, for these reasons, objected to the application.

\* See *Caines' Rep.* vol. 1. p. 511.

KENT, C. J. It ought to appear, that the persons Aug. Term,  
who were served, were those who ought to have 1804.  
sealed the bill. Nothing can be taken by the mo-  
tion.

*The President and Directors of the Columbian Turn-  
pike v. Robert Woodworth.*

THIS was an action brought for the penalty un-  
der the ninth section of the act incorporating the *Colum-  
bia Turnpike Road*, for simply riding through a  
gate without paying toll, without any force or vio-  
lence.

*Per Curiam.* The act had in contemplation only  
forcible and violent passings : the plaintiffs may sue  
for their toll, but this certainly is not a case within  
the penalty of the section relied on.

*Henry Masterton, gentleman, one, &c. v. Everard  
Benjamin.*

VAN WYCK moved to stay proceedings on a  
bail bond, under the following circumstances :

The writ in the original suit was sued out in last  
*August* vacation, returnable in the *November* follow-  
ing. Special bail was filed on the ninth of *December*  
then next, but notice of it not given. On the 5th of  
*May*, after a *ca. ad resp.* was issued on the bail-bond  
returnable in the then *May* term, on which the bail  
in the principal suit were taken. On this, notice of  
bail having been filed was given, with an offer of jus-  
tification, which the plaintiff, being satisfied of their

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1804. competence, waived. On this, the defendant on the 6th of June, served the plaintiff with an order from the recorder of New-York, to show cause before him, why the proceedings on the bail-bond should not be staid, and upon service, the plaintiff, without acting upon the order, agreed to stay proceedings till the decision of this court could be had.

*Williams*, contra, insisted the application ought to have been made the last term, and not to the recorder. There was, therefore, a *laches* not accounted for.

*Van Wyck* in reply, cited *Cole. Ca. Prac.* 57, 8. *Cromp.* 75. *High. on Bail*, 54, 5.

*Per Curiam.* The case in *Coleman* is decisive. Let all proceedings on the bail-bond, be staid on payment of costs.

*The People, on the complaint of Jared Bennett, v.  
Amasa King.*

ON *certiorari* upon a conviction for a forcible entry and detainer.

*Gold*, for the defendant, moved to quash the conviction, and that a re-restitution issue, for the following reasons: 1st. For want of certainty in the description of the premises, they being described only as "tenements and improvements," without naming the county in which situated. 2d. Twenty-four persons were sworn upon the grand jury, who found the bill, so that more than twelve were necessary to

the finding. 3d. Because a challenge to a grand juror for having given a bond of indemnity\* to the complainant, was overruled. 4th. Because the defendant was not brought into court before restitution awarded to traverse the indictment. 5th. Because, when the defendant voluntarily appeared and offered to traverse, he was refused. 6th. Because, it is not alleged, that the complainant was seised or possessed of the premises.

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\* See *Tre-  
lawney v.  
Thomas*, 1  
*H. Black.*  
303.

*Henry*, contra, opposed the issuing a writ of re-restitution, because the term under which the defendant claimed had expired.

KENT, C. J. The inquisition and proceedings below must be quashed, and re-restitution be awarded. The last objection is fatal, within the decisions of this court, in *Beebee* ads. *The People*, in January term, 1802, and *Shaw* ads. *The People*, August, 1803.† I think the second and fifth, also, are equally fatal. As to the objection that the term is expired, and neither party have title, we cannot inquire into, and decide by affidavit in this way on the title or rights of the parties ; the complainant below, has nothing to do with that. He must give up the possession irregularly obtained, put the defendant in *statu quo*, and then proceed legally to the question of title.

† *Caines*,  
125.

*Asa Mann v. I. Marsh.*

THE court ruled, that where a person pays money to a creditor, who has demands against him on two

Aug. Term, accounts, the creditor may place it to which he  
1804. pleases, unless the debtor direct its application.

*John Marscroft v. Caloin Butler.*

THE defendant had applied for his discharge, under the insolvent act, on the first *Thursday* in term, but no measures had been taken to bring him up till the last day. The plaintiff then moved for time to oppose on an affidavit, stating that notice of the application had come to him only on the second day of the then *August* term. That one *Benjamin Prescott*, of *Massachusetts*, was a material witness to prove the falsity of the defendant's inventory, and that he expected to be able to obtain his testimony.

*Per Curiam.* The prisoner must be remanded till the first day of the next term. We do this with regret, but the act is too imperative to admit of discretion. As the defendant did not apply to be brought up at an earlier day, it is in some degree his own *laches*. Let him be brought up next term.

*James M<sup>r</sup> Cabe v. John M<sup>r</sup> Kay.*

IT was ruled in this case, that an application for judgment on a frivolous demurrer, is an enumerated motion, and it was also at another day, in this same suit determined, that if the notice of motion specify that it will be grounded on the frivolousness of the demurrer, it will give the applicant a priority before other enumerated causes, and entitle him to his judg-

ment on reading the affidavit of service, and of general notice for argument, if no opposition be made. Aug. Term,  
1804.

*John Cross, junior, v. George Hobson.*

THIS was an application to be discharged out of custody, the defendant having been exonerated from the demand under the insolvent law.

*Per Curiam.* The defendant can take nothing by his motion. In the cause of *Caldwell v. Graham*, decided in *January* term, 1803, we determined we would not help an insolvent who omitted to plead his discharge as he might have done.

*William Bodwell v. John Willcox.*

IN this case an objection was taken that the notice of motion did not specify "at the city hall of the "city of Albany," but was only for the first day of the term, without designating the place.

*Per Curiam.* The notice is sufficient. Every one knows where the different terms are held, and the party himself evinces that, by coming here to oppose it.

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*Francis Cole v. John Grant.*

*The Same v. Gideon King.*

*Francis Cole et ux. v. John Grant and Gideon King.*

*Francis Cole v. John Grant and Gideon King.*

COSTS had been allowed to the defendants in the three first of these causes, to 26 dollars 53 cents, and in the last also, to *Gideon King*, to 14 dollars 84 cents, but in the last cause damages had been assessed against *Grant*, to 20 dollars besides costs, and *Cole* was unable to pay the costs taxed against him.

*Russel*, on an affidavit disclosing the above facts, moved to set off the costs allowed the defendants against the damages and costs recovered by the plaintiff in the last.

*Per Curiam.* Let the defendants have leave to set off their costs in the three first causes against 20 dollars damages recovered by the plaintiff in the last.—The costs of the plaintiff's attorney in the last suit, not to be included in the set-off, as he has a lien for them.\*

\* *Spencer v. White*, April, 1799. 2 Black. Rep. 817. 869. 871. 4 D. & E. 123.

*Jackson, on the demise of Jacob Spilsbury and others, v. Aaron Watson.*

THIS was an application to be paid for the value of improvements pursuant to the provisions of the act of the 5th of April, 1803, entitled, "An act granting relief to certain persons claiming title to lands

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"in the counties of *Cayuga* and *Onondaga*;" that Aug. Term,  
till the improvements were paid for, execution on the ~~—~~  
suit of possession might be staid, and that the judg-  
ment on the verdict obtained, might be entered with-  
out any costs of increase.

*W. Woods*, in support of the motion, read an affi-  
davit, stating, that the patent for the lands, to re-  
cover which the action was brought, was in the name  
of *Jacob Spilsbury*, who died previous to the 27th of  
*March*, 1803. That the defendant in 1797, settled  
on the premises, under a *bona fide* purchase, for the  
consideration of 387 dollars 50 cents, and was in  
possession. That the improvements had not been  
appraised, nor had the value of them been tendered  
or paid.

*Hildreth*, contra, read an affidavit, mentioning,  
that previous to bringing the suit, an offer was made  
to pay the value of the improvements. He urged  
also, that nothing was disclosed to the court evincing  
a claim in fee, or that the estate of the defendant was  
such, as would, according to the act, entitle him to  
the value of his improvements. But, admitting it  
was, it ought to be made appear in a legal manner.  
This could not be by the mere affidavit of the party.  
It must be proved by the same evidence as titles are,  
in other cases, substantiated. That this not being  
done, the defendant had not made out any right to  
what he claimed.

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1804. *W. Woods* in reply. The act points out no particular mode, and this has been adopted.

*Per Curiam.* Let the plaintiff have leave to perfect his judgment with costs to be taxed, and let all other proceedings be staid, that the defendant may have it in his power to apply to the chancellor, under the second section of the act, as he is entitled to the benefit of its provisions. As, however, the plaintiff, previous to the commencement of his action, offered to pay the value now demanded, we think him entitled to his costs, and we wish it to be understood, that in future, the claims of defendants to the value of their improvements under this act, will depend upon the report of the circuit judge.

*Daniel L. Van Antwerp v. R. and J. Ingersoll.*

THIS was a question of costs, by consent submitted to the court. The facts were, that in an action in the common pleas on a bill penal for 60 dollars, to secure two instalments, the defendant pleaded *non est factum*, with notice of setting off a receipt, which was allowed as to one instalment, and left a balance under 25 dollars due to the plaintiff.

The point was, whether the plaintiff should pay costs to the defendant ?

*Per Curiam.* The plaintiff must pay costs.\* This was a plea under the act authorising set-offs. 1 Rev. Laws, 347. The statute is positive and peremptory that judgment must be for the balance only. The

\* 1 Rev.  
Laws, 530.

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penalty, therefore, is immaterial on this point, for Aug. Term,  
the judgment is the test by which the costs are to be 1804.  
determined,

*John Strowell v. John Vrooman.*

IN this action, which was still pending in the common pleas for *Saratoga*, a motion had been made in the court below, in arrest of judgment, on which no decision had been pronounced. The counsel, however, on both sides, agreed to make a case of it, and submit the matter to the determination of this court.

*Per Curiam.* This practice is increasing, and becoming grievous. It is time it should be arrested. We ought not to decide cases, unless there be a *lis pendens* here. We cannot, otherwise, enforce our decision, and the very point may come up again. We, therefore, must refuse taking up the case.

*Schermerhorn, Mason and Bishop v. Gideon  
Tripp, Junior,*

ERROR from the common pleas in *Rensselaer* county. The suit below was *trespass de bonis asportatis* against a justice of the peace, a constable, and a plaintiff, in a suit before the justice under the 10*l.* act, for taking the goods of the defendant, in an execution on a judgment rendered by the justice. The defendants all joined in a plea of not guilty.—The evidence adduced was, that the justice lived in a tavern where he officiated as the tavernkeeper, made out the bills, and received payment for them, but that the justice did his business in a small out-

Aug. Term, <sup>1804.</sup> room, and the licence for the house was taken out in the name of the justice's son. This, however, it appeared from the justice's own declarations, was done to avoid the operation of the 20th section of the act.\*

\* 1 Rev. Laws, 502. —On this, the defendant below demurred to the evidence. The court having given judgment for the plaintiffs, the cause now came up on a writ of error, in which the general errors were assigned.

*Foote*, for the plaintiffs in error, submitted the case on the facts presented by the record.

*Woodworth*, contra, relied on the words of the act, and the testimony being such as to bring the justice clearly within them. If so, as they all joined in the same plea, they are all equally responsible. For where, in trespass against several, all unite in a plea of not guilty, the separate justification which one might have pleaded, is gone. 2 *Wils.* 384. 2 *Str.* 993.

**SPENCER, J.** The same point has been decided in this court in the case of *Percival v. Jones*, which was an action brought by a resident freeholder,† against a justice for apprehending him on a warrant.

*Woodworth* was stopped by the court.

**Per Curiam.** From the evidence below, it was conclusively shown, that the justice (*Schermerhorn*) was in fact, a keeper of a tavern, or lived in one. If so, he had no jurisdiction to try the cause,‡ and as the constable (*Mason*) joined with him and the plain-

† Under the  
3d sec. 1 Rev.  
Laws, 492.

‡ Sec. 20.  
1 Rev. Laws,  
502.

tiff, in pleading the general issue, they are all equally trespassers. Had the constable pleaded separately, he would probably have been excused ; but he has now involved himself with the others, and we cannot separate their fates.

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*Stephen Gould ads. Ambrose Spencer.*

*The Same ads. Thomas Tillotson.*

*Mathias Ward ads. Ambrose Spencer.*

*The Same ads. Thomas Tillotson.*

IN these actions, which were for libellous publications on the plaintiffs, in a paper entitled "*The Corrector,*" judgments had been entered on default, and writs of inquiry executed.

*James S. Smith* moved to set aside the defaults, and inquisition of damages on an affidavit made by himself, stating, that by the writs sued out in these causes, *Woodworth and Osborn* appear to have been the attorneys on record for the plaintiffs,\* but that the declarations were indorsed with the name of *Osborn* only. That the rules also, which had been entered in these causes were signed with the name of *Osborn* only, and this without any order of court obtained for that purpose ; and that the interlocutory judgments had been entered only four days before execution of the writs of inquiry.

\* A party  
cannot plead  
in the name  
of a firm.  
Per Ld. El-  
lenborough,  
in *Bunn v.  
Guy*, 4 East,  
195.

*Woodworth, Attorney-General, contra.*

*Per Curiam.* If the proceedings were not correct by being in the name of one attorney only, yet the

Aug. Term, of recovering. 1st. It is alleged, that the voyage  
<sup>1804.</sup> contemplated while the *Catharine* was at *Barcelona*, was different from the one insured, and that, therefore, the risk never commenced. The insurance being *at* and from *Barcelona*, it may admit of doubt, whether, as the loss happened there, the defendants would not be liable, although a voyage to the *Havana* were in contemplation. But on this point of law, we give no opinion, because it is sufficiently proved that the vessel was destined for *Baltimore*. Thus have the jury found, nor could their verdict have been different, without disregarding all the testimony in the cause. The defendants themselves are aware that this finding comported with the evidence, and have accordingly directed their principal attack against the testimony itself; for they say, 2d. That *Mumford* was the plaintiff's witness, and, therefore, could not be discredited by him. Whether this gentleman be regarded as the witness of the one or of the other party, is not very material in deciding this cause: he had been examined out of court, at the instance of the defendants, and cross-examined by the plaintiff, who produced his deposition on the trial. Perhaps the best general rule in such cases, would be to consider the witness, if his deposition be read, as belonging to the party on whose application he was examined, without any regard to the person who may finally make use of it. But without deciding this point, we think nothing was done by the plaintiff to discredit *Mumford*, even if he had been his witness. It is not every mistake which a witness may make, when speaking from memory, that will discredit him, and it would be a strange rule indeed,

that a party producing a witness, should not be permitted, even by the witness himself, to correct a mistake which he may have committed. Nothing more was done here; *Mumford* had sworn, that from certain papers, the destination of the cargo, according to his recollection, appeared to be for the *Havanna*; after this, there could be no impropriety in showing him the papers to which he alluded, or any other to refresh his memory, and to enable him to correct his error, if he had made one. This was no imputation on his character; it neither rendered him infamous nor unworthy of credit, as to the other point to which he had deposed: It discovered in the witness a laudable promptitude to rectify a mistake, into which an imperfect recollection had betrayed him, and thus added to, rather than detracted from, the weight of his testimony. 3d. The exhibits B. and C. being only copies, should not, it is said, have been produced. If no allusion had been made to these papers, by *Mumford*, they could not have been produced, to show the real object of this voyage, but he had already testified that he had made out certain claims against the *Spanish government*, for the *Catharine* and her cargo, which stated the vessel to be bound directly for the *West-Indies*: these papers, he added, were lodged in the consulate office, at *Barcelona*. Having sworn thus far from memory, the plaintiff had a right to refresh his recollection, by the showing him copies of the claims referred to: on inspection, he might probably be able to determine whether they were true copies or not, and certainly if he believed them true, they would furnish better evidence of what the

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originals contained, than any parol account of their contents, which was the only way in which the defendants had attempted to prove them. There is no reason to say, the originals were in the plaintiff's possession. They remained in a public office in *Spain*: and this kind of inferior proof, was rendered proper by the defendants' own conduct. They had not only examined the witness, as to the contents of these papers, but gave the plaintiff every reason to believe, that nothing would be required of him, but proof that the property was *American*. 4th. The abandonment, it is said, was too late. The *Catharine* was seized in *September*, 1800, and not abandoned until fifteen months thereafter. It has already been decided by this court, in *Earl v. Shaw*, that an abandonment may be made at any time after the accident, provided, at the date of the abandonment, the loss still continues total. This being the case here, the abandonment was in season. 5th. It is contended that Mr. *Mumford* was mistaken or surprised on his cross-examination; and that, therefore, a new trial should be had. For this purpose, his affidavit is produced, taken nine months after the trial, in which he states, that the captions of the exhibits B. and C. were not shown to him, to the best of his knowledge and belief, and endeavours to explain why they were made as they appear, to wit, to prevent endangering the insurance. This explanation comes too late; a witness under examination may explain and correct himself, but it will be dangerous and improper to receive any elucidation from him, after the trial, and especially after the lapse of so many months; besides, the defendants were apprised of his deposition, long before the trial, and are without excuse, for not calling on

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him then, to make such explanations as might be deemed important. 6th. But there has been a discovery of new evidence, and for that reason there should be another trial. It is said, that if a new trial be granted, there are two witnesses who were not known to the defendants at the time of the trial, who can testify as to the destination of the *Catharine*. This was the fact principally controverted on the former trial, and we are now applied to for another, merely because all the witnesses who knew something of the matter, have not been examined.\* Every one must perceive the inconvenience and delay which will arise from granting new trials, upon the discovery of new testimony, or other witnesses to the *same* fact. It often happens that neither party knows all the persons who may be acquainted with some of the circumstances relating to the point in controversy : if a suggestion then, of the present kind be listened to, a second, if not a third and a fourth trial, may always be had. There may be many persons yet unknown to the defendants who may be material witnesses in this cause, and this may continue to be the case after a dozen trials ; cases may occur in which, if great doubts exist, as to the first decision, it may be proper, on the discovery of further witnesses, even to the same fact, to open the cause

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\* It is no ground for the court to grant a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, where another witness, who was called, established the same fact, and the defence proceeded upon a collateral point, on which the verdict turned. *Edwards v. Evans*, 3 East, 451.

Aug. Term, 1804, for a second discussion : but this is not one of them ; the principal fact here was clearly proved, and if *Lewis and Byrnes* had both been examined, it is very uncertain whether the result would not have been the same. 7th. The last reason assigned for a new trial is, that a juror was challenged, in the absence from court, of the defendants' counsel, and in consequence of such challenge did not serve. It appears that the defendants' counsel was in court, when the trial of the cause was moved for and brought on : if he afterwards left it, it was his own fault. In contemplation of law, he was so far present, during the whole trial, that no motion, by the adverse counsel, after he had once appeared, could be regarded as *ex parte*. He had a right to make his challenges to the jurors, without inquiring whether the other counsel was in court or in the hall. On the challenge itself it is unnecessary to decide ; it may well be doubted, however, if it were not a good one to the favour : underwriters can hardly be proper jurors, in cases in which persons pursuing the same business are parties. Jurors should be "*omni exceptione majores.*"

The judgment of the court is, that the defendants take nothing by their motion, and that the rule to show cause why there should not be a new trial, be discharged with costs.

N. B. In another action on the freight of the same vessel, under the same facts, there was a demurrer to the evidence, on which the question was raised, whether a demurrer to evidence confesses all the facts which a jury *might* infer ? But the court avoided a decision on this point, saying there was enough to

warrant the verdict of the jury. SPENCER, J. how- Aug. Term,  
ever, declared he considered the demurrer confessed 1804.  
every thing a jury might infer. That he founded his opinion on the case of *Cokedge* and *Fanshaw*, in *Doug.* 119. and a similar decision in the *Livington* causes, in our own court of errors.

*Joseph Day v. William Wilber, q. t.*

IN error on a *certiorari* to a justice's court, upon a conviction under the 10*l.* act, for selling spirituous liquors without a license. The plaintiff assigned twenty errors, but relied principally on the following: 1st. That there was no indorsement on the warrant, either of the name of the plaintiff or the title of the statute on which the process was issued. 2d. That in the process or warrant issued on the plaint, there was no plea mentioned, nor that the defendant owed the plaintiff and the overseers of the poor any money and detained it from them. 3d. That the plaintiff and defendant being freeholders, the process was by warrant, and not by summons. 4th. That the declaration was in the name of the plaintiff and the overseers of the poor, when the process was in the name of the plaintiff only. 5th. That the justice refused on a motion made to quash the proceedings. 6th. That before the jury process was returned, another was issued. 7th. That the justice opened the court on the second day of *June*, and continued it open till the third before he tried the cause. 8th. That the justice swore the constable "to attend the said jury, " and to the utmost of his ability to keep that jury together until they had agreed upon their verdict,"

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1804 whereas, by the law of the land he ought to have sworn the constable to keep them "in some private and convenient place without meat or drink, except water, and not to suffer any person to speak to them, nor to speak to them himself, unless by order of the justice, or to ask them whether they have agreed on their verdict, until they have agreed on their verdict."

KENT, C. J. I shall consider the causes alleged for error in the order in which they naturally arise. 1st. It is alleged, that the directions of the act, commonly called the 10<sup>l</sup>. act, have not been observed, as the first process was by warrant and not by summons. The act directs that the justice, on application under the act, shall issue a summons or warrant, as the case may require; that the first process against freeholders and inhabitants having families, shall be by summons, unless the plaintiff shall prove on oath that he is in danger of losing his demand, or that he believes the defendant will depart the country, or unless the plaintiff be non-resident, &c. The return states, that the plaintiff below, prayed process by warrant, and that the justice thereupon, and in *pur-suance of the act*, issued his warrant; that the defendant was brought in on the warrant, and the plaintiff declared, and the defendant joined issue thereon, and prayed an adjournment, which was granted; and on the day to which adjourned, the parties again appeared, and then the defendant objected that the warrant did not issue in conformity to the act *regulating informations*. As the defendant, therefore, acquiesced in the process and never objected to it, be-

cause it was a warrant, and it being stated to be issued in pursuance of the act, we are to intend it was duly issued, or if not so, the irregularity was waived by the defendant. 2d. It is alleged, that the suit being for a penalty given by the 16th section of the tavern act, 1 Rev. Laws, 490. ought to have followed the directions of the act, passed 6th February, 1788, *to redress disorders by common informers*, which requires the name of the plaintiff and the title of the act to be indorsed. Proceedings under the 10<sup>th</sup>. act, are to be regulated entirely by that act, and the act relative to common informers, does not apply to these proceedings. The terms of it are altogether inapplicable. It supposes process to be issued by *a clerk*, and says that the like process shall be awarded as in an action *of trespass at common law*. 3d. The warrant is alleged not to state a plea or cause of action to which the defendant is to answer, and that it is stated, that the defendant is to answer *to the people*, whereas the 10<sup>th</sup>. act says, that justices shall not have cognizance of any cause wherein the people are concerned. The defects in the warrant, whatever they may be, are cured by the general plea of the defendant. He has waived all these defects since he pleaded the general issue, and afterwards made no other objection to the warrant, than that it did not conform to the act relative to common informers, and which act, as I have already observed, did not, and could not apply. We have decided in the cases of *Wool and Bevil*, July term, 1801, and of *Young and Canada*, January term, 1802, that a defective *venire* was cured if the party made no objection at the time, but went on to trial, and there is equal, if not stronger

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reason why a like conduct should cure a defective process, the only object of which was to bring the party into court. But I consider the process as good. It states the ground of action specifically, and that the plaintiff was the complainant upon oath, and that the defendant was to be brought in, to answer to the complaint of the plaintiff, and does not allege that he was to answer to the people. 4th. It is alleged that the declaration varies in substance from the process. The proper answer to this is, that the defendant by not pleading that variance, but pleading in chief has waived it, and so this court has frequently decided in like cases. But it is not true in fact, that there is any substantial variance. The declaration only unfolds more at large the same charge, which is briefly stated in the process, to wit, the retailing of spirituous liquors without a permit. 5th. Another objection is, that the justice overruled the motion to quash the proceedings, or as the record says, to abate the warrant. The answer to this has already sufficiently been given, since the only reason assigned why it should be abated, was that the process did not conform to the act for regulating informations. 6th. It is next objected, that the *venire* is defective, but as the *venire* was issued at the instance, and upon the prayer of the defendant, it does not lie with him to allege error in it. This point was decided by this court in the cause of *Callinan v. Jillson*, October term, 1801, and it has frequently been so decided in other cases, nor do I conceive it to have been illegal for the justice to have issued a fresh *venire* when the first *venire* had not been carried into effect, but had been *mislaid, kept, or withheld* by the defendant himself, to whom it had been

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delivered. This allegation in the record we are to take for *truth*, and it became indispensable then, that a new *venire* should issue, or the act of the defendant might have totally defeated the plaintiff's action. It would not have been legal, I apprehend, for the justice to have proceeded to try the cause without a jury, after the prayer of the defendant for one, and it would be most unjust for him to avail himself of his own *laches*, or act to injure the action of the plaintiff. I am of opinion, therefore, that the issuing of the second *venire* was proper, and that it is to be considered as the process of the defendant below, and that no objection to the form of it will now lie with that defendant. 7th. Another objection is, that the court was continued over from the second of *June*, when the first *venire* was returnable, to the third of *June*, when the cause was tried. If the court was opened on the second of *June*, as we must intend, and the delay created by the defendant in summoning the jury, rendered it requisite to keep the *court open* till the next day, there was no error in that proceeding. It became necessary, and the parties were bound to take notice of it and attend accordingly.— There is nothing in the law to prohibit a justice from continuing his court from one day to the next, when the exigencies of the case require it. If the defendant neglected or refused to attend, the justice was authorised to proceed in the trial *without him*; but we are rather to intend that the parties were present at the trial, for the record states, that the jury did hear the *proofs and allegations*, then and there made and exhibited. However, it is immaterial in respect to the objection, whether the defendant was, or was not

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Aug. Term, 1804. present. 8th. The last error alleged, and which requires notice is, that the constable was not sworn according to law to keep the jury. The act gives a precise form of oath in this case, and the return states that after the jury had heard the proofs and allegations, the constable was sworn *to attend them, and to the utmost of his ability to keep them together in some private and convenient place, until they had agreed upon their verdict.* The return does not state any further, as to the oath, nor are there any negative words excluding the inference that the whole oath was administered in the form prescribed. As far as the oath is stated it is correct, and, in thy opinion, we must intend the whole oath was duly administered. This intendment is, in many respects, reasonable, for in the first place, there was no objection stated at the time by either party to the form of the oath, and setting forth the words of the oath was an act of supererogation in the justice, as it formed no part of the record and process before him. The form of the oath to the witnesses is equally prescribed by the act, and yet the form is never or rarely set forth in the return to a *certiorari*, nor is it ever required. The record does not set forth the oath stated as given *in hæc verba*. It does not pretend to give the exact form of the one administered. If the oath, as far as stated, had varied from the act, it might have altered the case, but pursuing it as far as stated, and not being averred to have been *all* the oath that was administered, we are bound to conclude the constable was legally sworn. It has been established by several decisions in this court, that we would liberally intend in favour of the legality of justices' proceedings. Thus in the

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case of *Wright v. Anthony*, January term, 1802, we Aug. Term,  
said we would intend an issue joined if the parties \_\_\_\_\_  
went to trial on the merits ; and in the case of *Carna*  
*v. Penfield*, at the same term, the jury, it appeared,  
had found eight cents for the defendant on a plea of  
payment, and we intended a set-off, to help it out.  
These decisions are in conformity to the intent and  
spirit of the act which declares, p. 500. that we shall  
give judgment according as the very right of the  
*case shall appear*, without regarding any imperfection,  
omission or defect in the proceedings in the court be-  
low in mere matters of form. I cannot but think  
that reversing a justice's judgment, because part only  
of the constable's oath is inserted in the record, would  
be a decision at once new and rigorous ; especially,  
when none of it need be inserted ; when there are no  
words negativing the idea that the whole form was  
administered, when no objection was taken at the  
time by the parties, when we are bound to overlook  
all defects of form and decide on the very right of the  
case, and when in many other instances we have li-  
berally intended in support of their judgments.

THOMPSON, J. concurred in the above opinion in  
all points,

LIVINGSTON, SPENCER, and TOMPKINS, J. in all,  
except as to the constable's oath ; on that point, they  
conceived the error fatal, and therefore ordered judg-  
ment of reversal.

Gold, the next day, on an affidavit, stating that the  
manner in which the oath was set forth in the record,

## CASES OF PRACTICE

Aug. Term,  
1804. arose from a clerical error in copying, applied on the authorities of *Coup.* 325.\* *Doug.* 134.† and 1 *H. Black.* 238.‡ to amend the return. The Court was pleased to order, that the entry of judgment should be staid until further order, and that the justice have leave till the first day of next term to amend his return, so far as relates to the form of the said oath.

\* *Varelot and Smith v. Rafael.*  
† *The King v. Lyme Regis.*  
‡ *Skutt v. Woodward.*

*De Witt Clinton v. Peter B. Porter.*

IN debt on a bond, the plaintiff set out the real oyer of it. The defendant then demanded oyer, which was given to him variant from that set out, on which the defendant pleaded *non est factum.* The plaintiff then, without any rule or notice, served a fresh oyer, setting out the bond and condition truly; twenty days having elapsed, he signed judgment by default.

*Emott*, on affidavit disclosing the above facts, moved to set aside the default and subsequent proceedings.

*Van Vechten*, contra, insisted, that the case was within the eighth rule of April, 1796, which allows of amending declarations, &c. and that all permitted by that rule, might be done of course.

*Per Curiam.* Take the effect of your motion, with costs.

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*Jackson, ex dem. Van Slyck and others, v. Thomas*  
*Son.*

Arg. Term,  
1804.

IN ejectment on a motion for a new trial. It appeared that at *nisi prius* the plaintiff claimed by descent. On the cross examination of one of his witnesses, by the defendant, it came out that the ancestor had made a will, of which the judge, who heard the cause, admitted parol testimony, without any notice to produce it having been given.

*Per Curiam.* A new trial must be awarded with costs to abide the event. When the defendant cross-examined, he made the witness as much his own, as if he had himself called him. He, therefore, could not introduce through him any proof, which would not have been legal, had the witness been originally produced on his behalf. In *Jackson, ex dem. Van Rensselaer*, April term, 1801, the same point was ruled. The judge, therefore, was clearly wrong in admitting parol proof of a will, as the party did not show any notice on the opposite side to produce it.

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Nov. Term,  
1804.

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NOVEMBER TERM, 1804.

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*The People v. Samuel and Job Wright.*

THE defendants were in the custody of the sheriff, on very heavy civil process, and while thus detained, a warrant was issued against them, by one of the special justices for the city of *New-York*, grounded on an authenticated copy of an indictment found against them, in *Massachusetts*, for a fraud alleged to have been committed there.

*Riker*, district attorney, on these facts moved to have them taken out of the custody of the sheriff and committed to Bridewell.

*Per Curiam.* We cannot do it. We have no jurisdiction over offences committed in other states. The constitution points out a mode by which offenders, flying from one state into another, may be claimed. They must be demanded by the executive authority of the state from which they fled. The prisoners must be remanded.

*James Van Horne v. Joseph D. Petrie and others.*

IN this case the jury found a verdict in favour of the plaintiff, for fifty dollars damages and six cents costs. It was submitted to the court, whether he was not entitled to his costs of increase.

*Per Curiam*, delivered by LIVINGSTON, J. We Nov. Term,  
think he is not. The act declares, that if the plaintiff "shall not recover *above* the sum of fifty dollars "besides costs, he shall not recover any costs, but "shall pay costs to the defendant." The recovery here spoken of, means the damages assessed by the jury *eo nomine*, exclusive of the costs which they may arbitrarily find. The finding of a jury as to costs, has nothing to do with those which are to be allowed in taxation, otherwise they might entirely controul the statute on this subject; for, in many cases, where they could not, in conscience, give more than a cent in damages to the plaintiff, they might think it hard on him not to recover costs of increase, and, therefore, to entitle him to them, they might find a verdict for one cent damages and seventy dollars costs; this would hardly be allowed. If the verdict were recorded in this form, the court would not hesitate, in rendering judgment on it, to reject the finding as to the costs, as altogether nugatory, and not within the province of a jury: or, if they gave judgment for the costs thus found, the damages being under fifty dollars, they would (and such is our judgment here) order the plaintiff to pay costs to the defendant.

*Caleb Seaman v. Daniel Bailey.*

THIS case, which came before the court on a writ of error to the common pleas of *Orange* county, was, like the former, a question of costs. The plaintiff, who was the plaintiff below, had recovered twenty-five dollars, in the inferior court, and the judges there had ordered costs to the defendant.

Nov. Term,  
1804.

*Per Curiam*, delivered by LIVINGSTON, J. The plaintiff below, who is also plaintiff here, had his damages assessed by a jury of inquiry, over and above his costs and charges, to twenty-five dollars, and for those costs and charges to six cents. On this inquisition, the court of common pleas rendered judgment, that "the plaintiff recover against the defendant, his damages aforesaid, by the said inquisition above found, being twenty-five dollars and six cents; and further, that the plaintiff pay to the defendant eleven dollars and nine cents for his costs."

This judgment the plaintiff insists on is erroneous, inasmuch as it awards costs to the defendant, when he ought to have paid costs to the plaintiff. For the reasons assigned in the preceding case of *Van Horne v. Petrie and others*, we think the judgment below was right. The fifth section of "the act to reduce certain laws concerning costs into one statute," 1 *Rev. Laws*, §30. enacts, that if in any action of the nature of the present, brought in any court of common pleas "the plaintiff shall not recover above the sum of twenty-five dollars, he shall not recover any costs, but shall pay costs to the defendant." In our opinion, the plaintiff did not, within the meaning of this section, recover more than twenty-five dollars, notwithstanding, the jury gave him six cents costs, nor does the manner of rendering judgment, which is, in fact, only for the damages assessed by the jury, make any difference, although the attorney, in making up the record, has in a parenthesis, and in a way not very usual, stated these damages (very incorrectly by the bye) to amount to twenty-five dollars and six cents: As, in the case just determined, we take no notice of

the costs found by the jury, but consider the sum assessed as damages, as the *recovery* intended by the law, the judgment below must, therefore, be affirmed.

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1804.

*Daniel Farrington v. Samuel Rennie.*

IN trespass *de bonis asportatis* the defendant pleaded not guilty, and gave notice that the *locus in quo* was his freehold. At the trial, 17 dollars only were recovered. The plaintiff, however, contended he was entitled to full costs, as it appeared from the notice, that the freehold had come in question.

*Per Curiam*, delivered by LIVINGSTON, J. By the fourth section of the "act to reduce certain laws, "concerning costs, into one statute,"\* it is enacted, 1 Rev.  
Laws, 529. that, "if in any personal action prosecuted in this court, the plaintiff shall not recover *above* the sum of fifty dollars, *besides costs*, he shall not recover any costs, but shall pay costs to the defendant to be taxed." "Provided, however," that nothing therein contained "shall extend to any action where the freehold or title to land *shall* in any wise come in question." In this case we think it does not appear that it did.

Where *liberum tenementum* is put on the record in form of a plea, it does not necessarily follow, that the title will come into question. The plaintiff, by his replication, may admit that fact, and yet have a right to recover. Still less inevitable is this conclusion,

Nov. Term, 1804, where, subjoined to the plea, is a notice of the kind given, to which a party cannot reply, and the matter of which may be altogether abandoned, or not insisted on at the trial. Upon the whole, instead of looking at the pleadings, and relying on them how costs in these actions are to be disposed of, we think it best in future, in all cases of trial, to require a certificate of the judge who presided, "that the freehold, "or title to lands and tenements, did come in question," as the best and only evidence of costs being due under this proviso. Although the act be silent as to any certificate, we think it a mode of ascertaining the fact, the most free of objection, and not so liable to mistakes, as conclusions drawn from a reference to the pleadings. In this case we are of opinion that the plaintiff pay costs to the defendant.

*Benjamin Hough v. Timothy Stover.*

IT was ruled in this case at the last term, that an application in arrest of judgment, was a non-enumerated motion, and that the notice need not specify the reasons; because, as they are on the face of the record, they must necessarily appear to the adverse party.

*Henry H. Staley v. James Barhite, and Mary his Wife.*

IN error on *certiorari*, *Ostrander* submitted that the judgment obtained against the now plaintiff, by the present defendants, ought to be reversed. 1st. Because the wife was joined in the action below,

which was assumpſit, without showing how she had any interest: 2d. Because it appeared from the record, that a person not a constable was sworn to attend the jury, and for these reasons the judgment was accordingly reversed.

*David Hallock v. John Robinson.*

ON demurrer in trespass *quare clausum frigit*.—The plaintiff declared generally, for breaking and entering his close in the township of *Brookhaven*. The defendant pleaded *liberum tenementum*, specifying and setting it out by metes and bounds. To this the plaintiff, without new assigning, replied, his own freehold, traversing the freehold of the defendant, and concluding with an *et hoc paratus* praying his damages. The defendant demurred specially, and showed for cause a variety of reasons, but relied principally on the want of a new assignment, and the not concluding to the country.

*Sanford*, for the demurrant.

*Woods*, contra.

KENT, C. J. The replication is evidently no answer to the plea of the defendant, setting forth by specific metes and bounds, a particular close as his freehold. The plaintiff replies only, that the close in the declaration is his close, but says nothing as to the specific close in the plea, which is left totally unanswered. If the plaintiff had averred the close in the plea to be his, he ought, perhaps, to have tendered an issue. As, however, we think the plaintiff

Nov. Term, <sup>1804.</sup> should have new assigned, it is unnecessary to decide in what manner his replication should have concluded.

*Woods* applied for leave to amend on costs.

*Sanford* resisted, as there had been one amendment without costs, and hoped, if it was granted, it would be on payment of those formerly incurred.

**KENT, C. J.** Amend on payment of the costs of this demurrer.

*John Van Cott v. Nathaniel Negus.*

'TRESPASS on the case, brought in the common pleas, against the defendant, for so negligently and unskilfully managing his vessel, that she ran foul of, and injured the vessel of the plaintiff, and disabled some of his sailors. The jury found a verdict for the plaintiff, with six cents damages, and six cents costs. It was submitted to the court to determine, whether the plaintiff should recover his costs, or pay costs to the defendant.

*Per Curiam.* We think the defendant entitled to receive costs from the plaintiff.

*William H. Devoe v. Jacob Elliot.*

THIS was an action against the defendant to recover the value of a mare, sold by him to the plaintiff.

The facts were, that on the 17th *June*, 1800, a <sup>Nov. Term,  
1804.</sup> writ of *fieri facias*, was delivered to the sheriff of *Montgomery*, against the goods, &c. of *Avery Herrick*, returnable on the third *Tuesday* in *July*, then next. On the 10th of *November* following, *Herrick* bought the mare in question, and sold her to the defendant, of whom she was purchased by the plaintiff. A few days after this, the sheriff levied on the mare in the plaintiff's hands, and sold her by virtue of the writ, then remaining unsatisfied.

The only question for the court was, whether a sheriff by virtue of a *fieri facias*, put into his hands before the return day, can legally sell goods which the party, against whose property the writ issues, may acquire, subsequent to the return?

*Cadey*, for the plaintiff.

*Hildreth*, contra.

*Per Curiam*, delivered by THOMPSON, J. The only question arising in this case, for the consideration of the court is, whether a sheriff can, by virtue of a *fieri facias*, duly delivered to him before the return day, legally levy on, and sell goods and chattels acquired by the defendant after the return day in the execution? I think he cannot. I take it to be a general principle, that all process must be served before the return day. The utmost length the law allows for executing a writ is, the day whereon it is returnable. When a sheriff has levied an execution in due time, he may complete the same by sale after the return day, but should he omit levying until that

Nov. Term, 1804. day was passed, I should deem the execution dead. If these positions be correct, I cannot see how goods purchased by a defendant, after the return day in an execution is passed, can be taken and sold under such process. The only mode, I conceive, of getting at such property is, by procuring a return of the execution and issuing an *alias*. A contrary practice would be mischievous and a fraud upon other creditors.

The opinion of the court, therefore, is, that judgment of nonsuit be entered pursuant to the stipulation in the case.

*De Witt Clinton v. Mackay Croswell.*

THIS was an action for publishing a libel.

*Hopkins*, on the common affidavit moved to change the venue from the city and county of *New-York*, to the county of *Greene*.

*Riker*, contra, read an affidavit by the plaintiff, stating, that he resides in *New-York*, and that the suit was brought for the publication of a libel, in a newspaper, published in the county of *Greene*, by the defendant, and which he saw exposed to the view of many persons in this city, and that the plaintiff verily believed the defendant was the editor or printer of the said paper. On these facts it was insisted, that the affidavit of the cause of action arising wholly in the county of *Greene*, was not correct, because, wherever the paper circulated a right of action accrued. It was contended to be of more importance to

an individual to protect his character against libels disseminated in the place of his residence, than in a remote part where he might be scarcely known.— Therefore, in *Pinkney v. Collins*, 1 D. & E. 571. the court refused to change the *venue* from the place where the libel was circulated, to that where printed. Nov. Term,  
1804.

*Per Curiam.* There is no ground for the application. The defendant can take nothing by his motion, and must pay costs to the plaintiff.

*Candee v. Goodspeed.*

IN error on *certiorari* from a justice's court. The plaintiff was a non-resident, and the suit commenced by warrant.

The defendant, on account of the inevitable absence of a material witness, and after due diligence used to procure him, requested an adjournment for more than three days, offering the same security as is required by the 8th section of the ten pound act. The plaintiff refusing to consent to the delay, the justice, of his own authority, adjourned over. This was alleged for error.

*Per Curiam.* The seventh section is too positive and peremptory to be got over. The justice had not any power to adjourn beyond the three days.

*Anonymous.*

IT was ruled, that the causes in which public officers, such as the Attorney-General, district attorney,

Nov. Term, 1804. and the like, are concerned, have no preference at the sittings or circuits ; nor will such circumstance afford an excuse for not going to trial according to notice, or a reason to refuse judgment of nonsuit ; it being the duty of public officers to provide other counsel when they cannot themselves attend, and if they do not, it is at their peril.

*Josiah Waddington v. Chamberlin and Clason.*

LAST term the court had, in this suit, granted a rule to show cause why an attachment should not issue against *A. B.* but from some accident in the clerk's office, in *Albany*, the rule had not been forwarded, so as to admit of serving a copy twenty days before the term.

*Riggs*, on these facts, moved to renew the rule for the attachment, which was

Ordered accordingly.

*Day v. Wilber.*

THE court, consisting of only *Livingston* and *Tompkins*, Justices, said, very slight grounds would be sufficient to induce them to refuse vacating a rule, granted on argument, in full court.

*Mumford and Mumford v. the Columbian Insurance Company.*

IT was ruled, that judgment, as in case of nonsuit for not proceeding to trial, must be moved for the next

term after the *laches*, and the practice, according to Nov. Term,  
the case of *Brandt v. Buckhout*, ante, p. 186. was <sup>1804</sup> now confirmed.

*Codwise and Ludlow v. Hacker.*

THE plaintiff had brought an action against the defendant for disobedience of orders. The declaration consisted of two special counts, and one for money had and received. A verdict having gone against the defendant, he, in *February* last, applied to set it aside, which being ordered, he instituted, for the recovery of his wages, money laid out, &c. a cross suit, in which the general issue only was pleaded. On this being referred, it was agreed by a consent indorsed on the plea, that every thing might be shown in evidence, in the same manner as if pleaded. At the reference the plaintiffs in this action, perceived a report would probably be given in their favour, on the money counts in this suit, if they could also be referred, and, therefore, gave notice that they would apply for permission to refer the money counts, in this cause, on agreeing to no further prosecute the special counts for disobedience.

*Riker*, district attorney, resisted the application as involving in the discussion points of law, and being made with no other intention than to endeavour to get the referees to apportion the balance they might report due between the two suits, and thus give the plaintiffs costs on both. The full effect of this motion, he contended, had already been obtained ; the now

Nov. Term,  
1804

plaintiffs having, in the suit against them, set off every thing they could against *Hacker's* demands. He argued that it was plain the motion was only to avoid going to trial on the suit which they saw they must lose, because their demands on the counts they now relied on, were settled by the reference, and as to the special counts, the former decision of the court had determined those against them.

TOMPKINS, J. Upon an affidavit of the plaintiffs, that a suit of *Hacker* against them was depending in this court, which had been referred, and that the referees, it was apprehended, were inclined to report a balance in their favour, *if the state of the pleadings would admit of it*, I granted an order in vacation, to stay the filing of the report of the referees, in the suit in which *Hacker* is plaintiff, to give the plaintiffs in this cause, an opportunity of making the present application.

Upon the state of facts now disclosed, it appears to me improper to grant the plaintiffs' motion. By virtue of the consent indorsed upon the general issue, in the cause heretofore referred, the plaintiffs have their election to have the balance which may appear due to them, reported in their favour in that suit, or upon the trial of this cause, to recover such balance under the general counts. The circumstance that the trial of the cause will require the discussion and decision of important principles of law, affords a strong reason against the reference prayed for.

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Let the plaintiffs take nothing by their motion and Nov. Term,  
pay the costs of resisting. 1804

N. B. Only *Tompkins* and *Livingston*, justices, were present at the application. The latter gave no opinion, having been concerned, nor did the other judges, as they had not heard the motion.

*Daniel Williams v. Paschal N. Smith, President of the Columbian Insurance Company.*

THE plaintiff in this cause, had recovered for a *pro rata* freight. Thinking himself entitled to a verdict for the whole, he, in *May* term last, moved for a new trial, which the court refused, but said nothing as to the costs of application. The questions now were, whether the defendant should be allowed them; and whether, in taxing the general costs, interest should be allowed beyond the day on which the verdict was given?

*Per Curiam.* The costs of resisting the motion, go to the defendant of course. As to the interest, the plaintiff has himself been the means of delaying payment. The calculation, therefore, must be carried no further down than to the day on which the verdict was rendered.

N. B. In another cause, between the same parties, the court said, that the granting new trials, was always on payment of costs, unless otherwise expressed, or when for the misdirection of a judge; in which latter case they abided the event of the suit.

Nov. Term,  
1804.

*Michael Bergen and Elsie Garritson v. Nicholas Boerum.*

EVERTSON moved to set aside the execution issued in this cause, and to have satisfaction entered on the judgment upon an affidavit stating that the amount of the debt in the *condition* of the bond, on which the judgment had been confessed, had, together with interest and costs, been paid to the sheriff, who nevertheless threatened to go on and sell, in pursuance of the directions he had received, as the *fi. fa.* issued, was on a judgment for the *penalty*, and the writ indorsed to levy more than the sum paid.

He insisted that the sum in the condition is the actual debt. By the words of our statute\* it is made so. It allows the bringing into court the principal, interest and costs, in bar of the suit; and though the terms of the law are, that it be "pending the action," which may be now deemed to be at an end, yet in *Rich. K. B.* 211. and *1 Sell.* 359, 60. it will be seen, that courts of common law will extend the equity of a statute in cases like this, and *that* by virtue of their general controlling power over their own judgments.

*Emott*, contra, read counter-affidavits, setting forth that the bond and warrant, on which the execution was issued, were given to secure a debt, larger than the condition, for the surplus of which a promissory note was made by the defendant, payable at 30 days, under an agreement that if it was not duly honoured, the amount might be levied by execution, on the

\* 1 Rev.  
Laws, 349.  
sec. 6.

warrant of attorney ; that the plaintiffs had also other demands against the defendant, for *bona fide* debts, on notes of hands, to the amount of which the sheriff had been directed to levy, but that the whole did not exceed the penalty of the bond, the condition of which, together with interest and costs, had not been fully satisfied, as on calculation, two dollars appear to be still due.

Nov. Term,  
1804.

*Evertson* in reply was stopped by the court.

*Per Curiam.* We have no doubt of our equitable jurisdiction. It would be attended with the most mischievous consequences, to allow collecting more than is due on the condition. It would be trying the equity of the case in this way. It is against the very form of the contract, and liable to great abuse. It would be a deception on the world, for the condition which is to discharge the judgment is on record. If, therefore, it was to reach to other demands, it would be impossible to know what would satisfy the debt. As to the two dollars, *de minimis non curat lex.* Take the effect of your motion, with the costs of this application and those of that to the judge, for the order to stay proceedings.

\* \* \* An objection was taken to the notice of motion, for being simply, "*Nicholas Evertson,*" without the addition of "attorney for the defendant;" but the court paid no attention to it.

N. B. It was ruled in this cause, that an affidavit containing new matter, could not be read in support of a motion, though the facts in it were not known

Nov. Term, till the day of bringing it on. The party should have  
1804. served copies, and moved the next day.

*Joseph Day v. William Wilber.*

THE plaintiff had, in the last term, obtained a reversal of the judgment below, for a defect in the return of the oath administered to the constable. So soon as the court had delivered their opinion, the plaintiff's counsel left town. The next day *Gold*, on affidavit that the error arose from a clerical mistake in copying, obtained a peremptory order to amend. After the plaintiff had, on the judgment pronounced, made up his record, he was served with a copy of the order to amend. The application now was to vacate that order.

*Simonds*, for the plaintiff.

*Harison*, contra.

*Per Curiam.* We ought to alter the order complained of, and give till the first day of next term, to show cause against the amendment; that in the mean time all proceedings stay, and that the defendant's attorney serve a copy of Mr. *Gold's* affidavit, on the attorney of the plaintiff.

*Anonymous.*

*JONES* moved for a commission, to be directed to *New-Orleans*, though issue was not joined, nor the writ returned.

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*Per Curiam.* There must be peculiar circumstances\* to warrant the application. The intercourse between this and *New-Orleans* is constant. It is impossible to judge whether the testimony asked for will be material, before declaration, or knowing the point in contest.

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1804.

\* *Brain v.  
Rodelicks and  
Shoers, 1  
Caines, 73. S.  
P.*

*Jackson ex dem. —— v. ——.*

THE notice of motion to set aside a writ of possession, was not for the first day of term, nor for a non-enumerated day.

*Riker*, contra. It is bad. Though the court allows notice of a non-enumerated motion to be for another day than the first, still it ought to be for a non-enumerated day.

*Per Curiam.* If the excuse is sufficient, the notice is good; though for any day, notwithstanding the court will hear it only on a non-enumerated day.

*J. & S. Watson v. John Delafield.*

ON a motion for a commission, *Pendleton* objected, because notice of the application had not been given.

*Hoffman.* The decision, making it necessary, was pronounced only yesterday, and this is the last day of term.

Nov. Term,  
1804. *Per Curiam.* That would have afforded a sufficient reason for not giving the regular notice, but notice is requisite in all cases. Take nothing by your motion.

*Anonymous.*

THE application was to add a new count on the demise of a new lessor.

*Per Curiam.* Let the plaintiff have leave on the following terms. The defendant to have twenty days after service of the declaration thus amended, to elect whether he will continue to defend the suit, and if he shall so elect, then he is to have the costs usual in cases of amendment in other suits, and twenty days from the time of making such election, to plead *de novo* or abide by his former plea. If the defendant elect to proceed no further, then to receive all his costs up to the day of making such election.

*Ralph Pomroy v. The Columbian Insurance Company.*

BOGERT applied, in this case, for a new trial, on an affidavit of newly discovered evidence from *A. B.* a man of good character and reputation.

*Sawr* offered affidavits, to show the person from whom the information was derived, was a man not worthy of belief, and in the present instance actuated by motives of revenge.

Bogert objected to their being received, because it was trying a man's character, in a collateral way, by surprise, when he could never expect to be called on to support it, and must, therefore, be unprepared.

Nov. Term,  
1804.

*Per Curiam.* This person comes forward, in the light of a witness : every man who does so, puts his general character in issue. You have invited the inquiry, by stating him to be a man of character and reputation. Every witness at a trial is equally unprepared ; we do not, therefore, see why we may not question his credibility as much as if he was before a jury. Read the affidavits.

SPENCER, J. I dissent entirely from this determination. I think it may lead to very oppressive and serious consequences. A man's character is to be sifted, not from what he appears and says himself, but from what others relate of him. He may not even be present, when the information he gives is made use of, and must, therefore, be surprised by such an inquiry. I cannot agree to trying a man's reputation in this manner.

*Anonymous.*

JONES, on a mere notice of motion and affidavit of service, moved to add a new count, in a declaration in ejectment, on the demise of a new lessor. It was opposed. But,

Nov. Term,  
1804. *Per Curiam.* Take your motion on the usual terms. If the opposite side abandon his defence, you pay all costs;\* if he vary it, the costs of the former pleading.

\* S. P. Wim-  
ple & an'r v.  
M'Dougal,  
*ante*, p. 55.  
citing Jack-  
son ex dem.  
Quackenbos v.  
Dennis.

### FEBRUARY TERM, 1805.

#### *Samuel Henshaw v. The Marine Insurance Company.*

HOFFMAN, for the defendants, objected to the cause being brought on, because the points on which the plaintiff meant to rely, were not added to the case served upon him.

Jones, contra, then tendered to him a statement of the points, and at the same time served the judges with copies. This he contended was sufficient.

Hoffman, in reply. The rule ordering points to be subjoined to the cases made, was intended as much for the ease of the opposite counsel, as of the court.

*Per Curiam.* It is sufficient to serve the points on the opposite party at the time when the case is delivered to the court, and when the motion is made to bring on the argument.

IN THE SUPREME COURT.

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*The People v. Pierre C. Van Wyck.*

ON a motion by the Attorney-General for an attachment.

The ground of application, and objections to it, being contained in the decision, it is unnecessary to relate the argument by counsel.

*Per Curiam*, delivered by LIVINGSTON, J. In November last, a rule was obtained by the Attorney-General, calling on the defendant to show cause, on the first day of this term, why an attachment should not issue against him, for not appearing as a witness between *The People* and *Richard Riker*, after being regularly served with a *subpæna*. The defendant shows for cause, and by affidavit, without personally appearing in court, that "a ticket, which is annexed to his affidavit, was served on him, but that no *subpæna* was shown to him at the time, and further, "that there was an indictment pending in the *oyer* "and *terminer* against *Riker*, who was bound to appear in that court, and not at the term."

It is insisted that the defendant should have shown cause in person, and that the facts disclosed by his affidavit, if cause can be shown in that way, are not sufficient to prevent the rule for an attachment being made absolute.

In the case of *The People v. Freer*, *ante*, p. 300. cause was shown, as here, by affidavit, and although the court say, that "on such occasions the

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that point was not raised, and of course ought not to  
be regarded as settled.

Nor is it important to ascertain what is the mode in *England*. In a point of practice, and this is nothing more, we certainly may adopt a rule for ourselves, and alter it again, if it become inconvenient. We think it would produce great oppression, and unnecessary expense, to compel a party, who may be perfectly innocent, on a rule to show cause, to appear in person. Why bring a man from *Ontario* to *New-York*, to swear that he was sick, and, therefore, unable to attend on a *subpæna*, when that fact can be as easily communicated by his affidavit, properly taken? An attachment might almost as well go in the first instance. We, therefore, think the defendant's personal attendance was unnecessary.

The merits of his affidavit are next to be examined. It appears by the ticket left with him, that the name of the city in which the court was to be held is omitted.\* The terms of this court, and the places of its meeting being regulated by a public act, we think the ticket good, notwithstanding this omission, especially too, as the defendant does not pretend ignorance on this head, and is a counsellor of this court. Neither is it important that the indictment, on the trial of which he was to testify, was found, and then pending in the *oyer* and *terminer*. The Attorney-General could have brought it into court, for trial, on the return-day of the *subpæna*, which would have been sufficient.

\* *Bodwell v. Willcox, ante*, p. 367.

The greatest difficulty arises from the defendant's denial, that a *subpoena* was shown to him, at the time of leaving the ticket. But as the officer who served it, swears positively to this fact, we think some further explanation necessary. The defendant does not say, that a *subpoena* was at no time shown to him, nor that this was the only ticket he received. It is probable the officer, on recollecting the mistake, may have returned, and shown it, or that he made an entire new service, or that something may have passed rendering the exhibition of a *subpoena* unnecessary. At any rate, we think this matter ought to be further inquired into, and that, therefore, the rule for an attachment be made absolute.

*John Sayer v. John Finck.*

HOPKINS moved to set aside the inquest taken in this cause at the last sittings, in New-York, on an affidavit by two persons, that the debt for which the action was brought, had been paid, and on another affidavit by the defendant's attorney, stating, that he did not attend when the cause was called on, because, from a conversation with the partner of the plaintiff's attorney, and who he thought was attorney also for the plaintiff, he was led to imagine the trial could not be had on that day, as there were eighteen prior causes on the day docket, and that the plaintiff's attorney himself would not attend.

*Per Curiam.* Let the inquest be set aside, on payment of all costs. The court grant this only under the peculiar circumstances of the case. It ap-

Feb. Term, 1805. pears, that the defendant's attorney thought he was conversing with a person who was acting as attorney for the plaintiff. This belief might easily be induced, from this circumstance, that the attorney on record and the person spoken with, were in partnership. It was, however, but an opinion of the adverse attorney, that the cause would not be heard. We shall, in future, expect more explicit reasons, for thinking a cause will not be brought on. The affidavit of merits is very strong. Taking this, together with the misapprehension of the defendant's attorney, that the partner of the plaintiff's attorney was absolutely concerned in the suit, are the grounds of our present determination.

*James Jackson v. John Stiles.*

IT was ruled, that if a person be admitted to defend on payment of costs, and, after entering into the consent-rule, keep out of the way to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause, why an attachment should not go against him; and that service of that rule, at the defendant's house, shall be sufficient.

*John Kane and Oliver Kane v. Isaac Scofield.*

THE declaration in this case stated the indorsement of a promissory note to a firm whose surnames only had been used, in the following manner, "to certain persons using the name, style, and firm of

"*Willoughby and Weston*," and it afterwards stated Feb. Term,  
1805. their indorsement to the plaintiffs, thus: "and the \_\_\_\_\_ said persons so using the name, style, and firm of "*Willoughby and Weston*, indorsed the said note, the proper hand-writing of one of them, in their said co-partnership, name, style, and firm, being to such indorsement subscribed." To this the defendant put in a general demurrer.

*Hopkins*, on a notice of motion, for the eleventh, moved to overrule it as frivolous, and claimed, on that account, a priority to other causes entered for argument.

*Caines*, contra, insisted, that the right of bringing on a demurrer in preference to other causes set down for argument, applied only to cases where no opposition was made. *M'Cabe v. M'Kay*,\* in *August* last. Ante, p. 366. That, at all events, the notice was bad, being for the eleventh instead of the first day of term.

*Hopkins*, in reply. The demurrer book was not made up till the first day;† the caption is of this term.

*Per Curiam*. By the opposition of the case cited, is not intended the mere saying of counsel that they oppose; it must be such as has at least a colour or semblance of reality. The notice could not be for

\* The time at which a question on demurrer shall be deemed to arise, shall be the day the joinder was received by the party demurring. 3d Rule, *January*, 1799. *Ante*, p. 10.

Feb. Term, the first day. It appears by the record, that it was  
1805. — not till then that there was a joinder in demurrer.

N. B. *It was ruled in this case, that where the reason of not noticing for the first day of term, appears on the face of the record, no affidavit in excuse need be made.*

*Richard Furman v. Benjamin F. Haskin.*

HARISON, after judgment for the defendant on the demurrer, asked leave of the court, to withdraw the demurrer and take issue on the fact.

KENT, C. J. Take it; for it is allowable in all cases where the demurrer is not frivolous, if applied for in the same term.

*Noah Pomroy v. John Preston.*

IN error on a bill of exceptions from the common pleas. The plaintiff had not assigned errors, and after the return of a *sci. fa. quare exceptionem non*, moved for leave to take out a writ, ordering the judges of the court below, to come in and confess or deny their seal, and that in the mean time, all proceedings by the defendant should be stayed. Ordered accordingly, and that the judges appear, at the city-hall of the city of New-York, on the first day of next term.

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*William Van Doren v. Jacob Walker.*

IN error on *certiorari*.

*Cadey*, for the plaintiff. The return does not state that any constable was sworn to attend the jury, though it is evident they retired.

*Van Vechten*, contra. As no improper practice is alleged, and it does not appear a constable was not sworn, the court will intend it was done.

*Per Curiam*. As nothing is said about a constable's being sworn, or having charge of the jury, the court cannot supply it by intendment. There are no words in the return to intend by. We might as well intend an issue joined, or a *venire* when nothing is stated. The justice must state, as the writ requires him, all his proceedings; the whole history of the suit. When a proceeding so essential is omitted, we cannot consider it as done.

*Nicholas Low v. Jacob W. Hallett.*

ON a motion to change the *venue* from *New-York* to *Ontario*, in an action for use and occupation, the defendant swore all his witnesses resided in the latter county, where the house was situated.

*Hoffman* resisted it because the action was transitory, and on an affidavit by the plaintiff, stating his

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1805. case to rest on written receipts, and an agreement ex-  
ecuted in *New-York*.

*Per Curiam.* Take the effect of your application. The papers may be more easily transferred to *Ontario*, than the witnesses carried to *New-York*. The plaintiff does not show he has a single witness where his *venue* is laid, and the action being founded in privity of contract, not of estate, is of course transitory.

*Luther Spencer v. William R. Hulbert.*

SIMONDS moved to change the *venue* to *Oneida*, on affidavit by the defendant, that the witnesses, which his counsel advised were material for him, resided there.

*Williams*, contra. The action is for goods sold and delivered in *Hudson*, where the plaintiff lives.

*Per Curiam.* Here is special matter in addition to the common affidavit, and in such a case, unless the plaintiff will, by affidavit, state that he has one or more witnesses residing elsewhere than in the county where the *venue* is moved for, the court will order it to be changed. It is just and reasonable, where the plaintiff has no witnesses out of the county where the *venue* is moved for, that we should grant the application, even though the action be for goods sold and delivered, or other transitory matter.

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1805.

*Brandt, ex dem. Walton, v. Ogden.*

IT was ruled in this cause that if a public officer inform the court, that the situation of a county is such as to require, for the sake of the peace of the people, a decision on the point contained in a cause, it will take preference of all others on the calendar.

*John B. Brevort v. Samuel Sayre and Phineas Hurd.*

BOYD moved to set aside the inquest taken in this cause, on an affidavit, stating that the day on which the cause was set down for trial, one of the defendants, who was merely a surety for the other, sent a message to the plaintiff, by which he requested a meeting, to settle the suit if possible, in consequence of which an appointment was made for the evening, in order to try to compromise, but during the course of the day the inquest was taken.

*Per Curiam.* Take your motion.

*Anonymous.*

IT was ruled, that a motion to overrule a frivolous plea, and be at liberty to enter a default, as if no plea had been filed, has the same preference as motions on frivolous demurrers.

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1805.

*Joaquim L. Steinbach v. William Ogden.*

IN the case made, the points relied on were not specified, but merely stated by the opening counsel.

*Per Curiam.*: You are not entitled to bring on the argument. The points should have been reduced to writing, and this not merely for the benefit of the court, but of all parties.

*The Mayor and Corporation of New-York v. Comfort Sands.*

PENDLETON moved to set aside a default and judgment obtained on a penal ordinance by the corporation of the city of *New-York*, directing the defendant, as owner of certain vacant lots, to fill them up. The affidavit read denied his being owner.— It also set forth, that the defendant had, on that ground, applied by petition to be relieved, but before any answer was given, and whilst the application was pending, the default and judgment were entered.

*Harrison*, contended that as the proceedings were regular, the petition ought not to have the effect of suspending them. The fact relied on as an excuse, was a legal defence, and might have been pleaded if true.

*Per Curiam.*: The proceedings complained of took place while a petition was pending, and there is,

therefore, something of surprise. In addition to this, <sup>Feb. Term,</sup>  
there are, in effect, merits disclosed. Let the default ~~—~~  
and judgment be set aside.

*John Patrick v. Hallett and Bowne.*

MOTION for judgment as in case of nonsuit, for  
not going to trial.

*Riggs* resisted, because the cause had been once tried, and our act,\* being like that of the *English*, <sup>\* 1 Rev.</sup>  
*Laws*, 353. required the same construction, under which it was held a plaintiff could not be nonsuited for not trying a second time. If we are wrong we are ready to stipulate.

*Per Curiam.* We have no doubt of the power of the court to nonsuit on a second trial. A plaintiff who has once tried his cause, after which the verdict is set aside and a new trial awarded, is bound to try again, and again, if necessary, and if he do not, the defendant may apply for a nonsuit. But as the *English* practice has misled, and our own has not been perfectly settled, the plaintiff may stipulate and without costs.

*Rogers v. Garrison.*

THIS cause had, at the last *New-York* sittings, been set down for trial on the day docket, but from some little confusion as to the suits that would be heard before the respective judges, who separately at different times presided, the counsel did not attend.

Feb. Term, 1805. A motion was made for judgment as in case of non-suit.

*Per Curiam.* Stipulate and pay costs.

LIVINGSTON, J. I dissent from this, because the only use of a day docket is to enable the bar to know what causes will come on, and it then becomes their duty to attend. If we allow of excuses of this sort, the force of the rule, in the city of New-York, by which day dockets have been established, will be totally done away.

*John A. Eckhart v. Justus Dearman.*

OSTRANDEr moved to set aside the default and all subsequent proceedings on the following facts: On the second of October, the declaration was served on an agent. On the eleventh, the defendant gave notice of a motion, to be made the 12th of November, for leave to change the *venue*, but on the 10th, the plaintiff entered a default, and never appeared on the 12th, to oppose the application, in consequence of which the *venue* was changed as of course.

*Per Curiam.* The defendant's conduct has not been perfectly regular. He ought, according to the rules of practice, to have obtained a judge's order to enlarge the time to plead, or a certificate to stay proceedings. But though there was an irregularity in the defendant, and the plaintiff was correct in entering the default, he has waived both by silently acqui-

escing in the event of a motion, which he knew must be successful. By not appearing his language is, I consent to the application. If so, he certainly agrees to relinquish the default, and every other advantage.

Feb. Term,  
1805.*Palmer and others v. Mulligan and others.*

THE court ruled that if a party neglect applying, in a former term, for all the costs he was entitled to on his then motion, he waives those for which he does not ask, and cannot, in a future term, make them the ground of a subsequent motion.

*Manhattan Company v. Lydig.*

HOFFMAN moved for a struck jury, on an affidavit, stating the case to be intricate and important.

Jones contended that it was defective in not showing wherein the importance or intricacy consisted.

*Per Curiam.* In all these cases the court ought to see, from the facts laid before them, that the cause is either intricate or important, and not submit themselves to the opinion of the attorney. We want something beyond his mere affidavit. The words of the statute require this. If, indeed, there be no opposition, then the motion passes, as in other cases, of course; because the opposite party by his conduct confesses these requisites.

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1805.

*Shawe v. Wilmerden.*

AFTER pleading the general issue, the defendant obtained his discharge under the insolvent law. His then attorney, who had long since declined business, gave notice, that he would give this special matter in evidence. The action being now again proceeded in, application was made for leave to strike out the notice, and plead the discharge, as the mistake of the attorney formerly employed was the reason why it was not before done.

*Harison*, contra. The known rule is, that an insolvent must plead his discharge. In the present case it ought to have been *puis darrein continuance*. It is a defence *stricti juris* and not to be favoured.

*Per Curiam*. Let the defendant, on payment of costs, have leave to withdraw his notice and plead the special matter, the plaintiff to be at liberty to discontinue without costs.

*Manhattan Company v. Brower.*

HOFFMAN objected, on a motion for judgment as in case of nonsuit, for not proceeding to trial at the *New-York* sittings, according to notice, that the affidavit did not state the cause to have been on the day docket. This he contended ought always to be shown, because, unless so placed, it could not come on, and the plaintiff, therefore, could not be in default.

*Per Curiam.* Its not being on the day docket, is <sup>Feb. Term,</sup> 1805.  
matter of excuse, to come from the plaintiff, and appear by affidavit.

*William Smith v. James Cheetham.*

IT was ruled in this cause, that an application to set aside a verdict for irregular conduct in a jury, is a non-enumerated motion.

*Koy v. Clough.*

THE attorney in this cause, from a sudden and dangerous illness, was unable to attend the execution of the writ of inquiry, in consequence of which the plaintiff's attorney was requested to postpone the execution of it, but he refusing to do this, went on and executed the writ, upon which, pretty smart damages were given. Application was now made to set aside the inquisition.

*Per Curiam.* The inability of the defendant's attorney to attend the execution of the writ, and the defendant himself having no notice of the day, are reasons for setting aside the inquisition, especially as the damages are rather excessive. But as the defendant's default is, in some degree a confession of the plaintiff's right, the rule can be only on the defendant's consenting that the judgment on the inquisition shall be entered as of this term.

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1805.

*Reuben Knapp v. Garret Onderdonk.*

SMITH moved for leave to the justice to amend his return.

*Caines*, contra. Independent of errors having been assigned and joinder, the justice has made an affidavit, contradicting the existence of the fact, in which the amendment is requested. Besides, two notices of argument on the error assigned have been given.

*Per Curiam.* There is an evident *laches*. If the amendment is necessary, it ought to have been applied for, before noticed for argument. The plaintiff in error must have known what was necessary to support his own assignment.

*Anonymous.*

THE service of the case made in this cause was, by putting it under the door of the opposite attorney's office, which was locked, but from the window's being open when this was done, and being very shortly after seen to be shut, the plaintiff's attorney swore he had reason to believe the case came to the hands of the attorney of the defendant. From these circumstances, and their not being contradicted, the court was pleased to consider them as evidence of the case being received.

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1805.

*M'Kay v. The Marine Insurance Company.*

THE defendants at the *New-York* circuit, moved to put off the trial, for want of the testimony of a material witness, who was a transient person, and had once been within their power. The court refusing to do this, a verdict went against them, in consequence of which, and the absence of their principal counsel, the defendants moved to set it aside.

*Per Curiam.* The decision at the circuit was right. Whenever a party has had an opportunity to examine a transient witness, and has suffered it to pass by, the want of his testimony is no objection to going to trial. In *Post v. Wright and Buchan*,\* the <sup>ante, p.</sup> <sub>183.</sub> absence of counsel was urged as an excuse, but the court refused to admit it, and we think all excuses of that sort ought to be discountenanced.

*John Felter v. William Mulliner.*

ON *certiorari.* The court ruled that if there has been a former trial, for the same cause of action, and a justice refuse evidence of it, he will be ordered to amend his return, by setting forth the testimony offered.

*Jackson, ex dem. Kemp and others, v. Parker and Brewster.*

CAINES applied for a rule, ordering the plaintiff, who had obtained a verdict, to make up the record within a given time, or that the defendant have leave

Feb. Term,  
1805. *Per Curiam.* Take your motion on payment of  
costs.

*George Codwise and others v. John Hacker.*

THE defendant in this cause, without any previous rule for trying it by proviso, gave a simple notice that he should bring it on, but inserted a proviso clause in the *venire*. Under these circumstances he obtained a nonsuit at the last term, to set aside which, application was now made on behalf of the plaintiff, who did not notice for trial; the court, however, refused the motion in consequence of the proviso clause being inserted in the *venue*, but at the same time made the following general rule.

*Ordered,* that hereafter the defendant shall not try a cause by proviso, without a previous rule for that purpose, to be granted by the court on the usual notice.

— — —

MAY TERM, 1805.

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*Stephen Brown v. Caleb Smith.*

ON *certiorari* from a justice's court, in trespass *quare clausum fregit*, the errors relied on were, 1st, That the verdict being for one mill, no judgment

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could be, or in fact was rendered upon it. 2d. That May Term,  
as no costs were found by the jury, the justice was ~~1805.~~  
not warranted in giving judgment for any.

*Sanford*, for the plaintiff.

*Bogert*, contra.

*Per Curiam.* On the second point it is unnecessary to say any thing. The jury need not find costs ; they are given by the statute, wherever damages are found. But the judgment must be reversed ; without any law, none could be given on such a verdict ; it is a nullity and could not be the basis of any judgment.\* In that which is now rendered, the justice is obliged to reject the verdict, for there is no judgment as to the mill. It is for costs only, and if carried into effect, there could be no levy for the verdict. There is no such currency as the sum given.

\* See Finck's  
Law, 29.  
*Shore v. Thomas*, Noy  
Rep. 4. Contra.  
*Marshall v. Bul-*  
*ler*, 2 Roll.  
Rep. 21.  
Vide also 2  
*Bos. & Pull.*  
36. Governor,  
&c. of Har-  
row School v.  
Alderston.

*Mathew Cod et ux. v. Richard Harison and others.*

IT was ruled, that in partition the practice is the same, when unopposed, as in other cases, and, therefore, only the notice and affidavit of service, need be read.

*James Jackson, ex. dem. Peter Waggoner and others,*  
*v. James Murphy.*

EMOTT, moved for a rule, ordering the lessors of the plaintiff to permit a survey to be taken by the defendant of the boundaries, and marked trees of a patent under which he claimed, on an affidavit stat-

May Term, 1805. ing, that it was necessary for his defence to ascertain the lines of it, but that a person sent by him for that purpose, had been prevented by the agent of the lessors who derived title under an adjoining grant.

KENT, C.J. Were we to grant this application, could we enforce the leave we had given? Suppose an action of trespass brought, would this be a justification? But, it does not appear to me, that our inference is necessary. The judge at the circuit would, upon the grounds now shown to the court, postpone the cause. You may, however, take your rule to stay proceedings, till the lessors of the plaintiff enter into a consent rule for having a survey made.

*Nicholas Low v. Jacob W. Hallett.*

EMOTT, on the common affidavit, that the trial of this cause would require the examination of long accounts, moved for a reference.

Hoffman, contra, read an affidavit by the plaintiff, simply stating, that as he was advised by his counsel, and verily believed, the controversy would necessarily involve questions of law.

Emott, in reply, submitted to the court whether the affidavit ought not to have specified what those questions of law were.\*

\* See *Lusher v. Water, ante*, p. 206.

THOMPSON, J. I believe the usual mode has been to state them.

*Per Curiam.* The addition of "as advised by <sup>May Term,</sup> ~~1805.~~" counsel," is sufficient. It is to be presumed, that counsel would not advise, unless there was some foundation. Take nothing by your motion, and pay the costs of resisting.

*Seth More v. Asa Bacon.*

MOTION to amend a justice's return by altering the date of an act, mentioned to have been passed on the 7th day of *April*, 1804, to the 7th day of *April*, 1801.

*P. W. Radcliff* read an affidavit by the attorney of the defendant in error, that the mistake was a clerical misprision, which he did not discover till the 27th of *March* last, when a copy of the assignment of errors, in which this was set forth as a cause, was served on him, with a notice to join in error in twenty days, or that a default would be entered.

*Caines*, contra, urged that the application could not now be heard, as from an affidavit of the attorney for the plaintiff, it appeared to be after joinder in error on this very point, so late as the 22d of *April*, and that, in such cases, the rule was, not to allow of amendments.

*P. W. Radcliff*, in reply. The papers before the court, show that the parties live in a remote county, and the joinder was merely to prevent the entry of a default for want of being served with an order to stay proceedings.

## CASES OF PRACTICE

May Term,  
1805.

*Per Curiam.* The observation of the defendant's counsel takes this case out of the general rule. The order to stay proceedings was applied for, and evinces, that the joinder was a mere matter of precaution, not a reliance on, or affirmation of the correctness of the proceedings. The amendment, therefore, must be allowed, on payment of the costs of the assignment of errors, and those of resisting this application.

*Bach and Bach v. Coles.*

THIS was an application to the court, in the first instance for an order to stay proceedings on a case made.

*Per Curiam.* Though the rule authorising parties to apply to a judge for this purpose, does not abrogate the power of the court, yet we ought never to be resorted to, till the other mode has been attempted. This is chamber business.

*Richard Hartshorne and others v. David Gelston.*

PENDLETON moved for a struck jury in this suit, which was for erecting a beacon on the plaintiffs' lands at *Sandy-Hook*, after being warned not to do so, on an affidavit, stating a former action and recovery for the same offence, the pendency of two suits for a continuance of the original trespass, and that the defendant was, as he verily believed, reimbursed by the government of the *United States*, for the damages paid in the first action, and would be indemnified by them, against any recovered in the

present, or other suits. These circumstances, and the probability that the general government was interested in the cause, were sufficient, he contended, to make it of such importance as to require a struck jury.

*Per Curiam.* There is nothing in this case which is not fitted to the capacity of an ordinary jury.—The parties litigant do not make a case important.

*John Ball v. John P. Ryers.*

THE plaintiff in this suit had issued a *fi. fa.* upon a judgment he had recovered.

*Riker*, citing *Doug.* 231.\* now moved for a rule directing the sheriff to pay over, on the execution thus sued out, the sum of 197 dollars 26 cents, being the surplus arising from a leasehold property, levied on and sold, in an action against the same defendant, at the suit of another plaintiff.

Ordered accordingly.

*Colman I. Keeler v. John Adams.*

HOPKINS moved for a rule on a justice, ordering him to amend his return by inserting the sub-

\* *Armistead v. Philpot.* But if a plaintiff have, in the hands of the sheriff, money arising from an execution, a levy cannot be made on such money by virtue of a *fi. fa.* against the plaintiff, for the mere raising the money by execution, does not, it is said, pass the property in it to the creditor. *Turner v. Pendall*, 1 *Craack*, 117. In the principal case, *Livingston*, J. said, he had no doubt money might be levied on. See *Dalton's Sheriff Accord*. But vide *Fieldhouse v. Croft*, 4 *Eest*, 510. overruling *Armistead v. Philpot*.

May Term, 1805. Stance of a notice given at the trial of the cause, and the testimony adduced under it.

The affidavits of the defendant and his attorney, set forth that the action was trespass on the case, for not returning and misusing four beds, bedsteads and some furniture, let to the defendant for 6 months, to which not guilty was pleaded, with a notice, that at the trial, evidence would be given, that the hiring was for twelve months, at the rate of 4 dollars *per bed per annum*, and that the defendant had paid more to the plaintiff than the rent for six months amounted to, and also, that the plaintiff had, before the expiration of the year, by force, taken away the goods demised, and that the defendant would, on the hearing, insist on recovering the balance due him, on the overplus of the rent paid. That proof was made of these circumstances, and the jury found a verdict in his favour for three dollars damages and six cents costs, upon which, the plaintiff sued out a *certiorari*, and had assigned for error, that the jury gave damages for the defendant, when he claimed none by his plea.

To these depositions, was annexed a certificate from the justice himself, corroborating their contents.

*Emott*, contra, read affidavits made by the plaintiff, his attorney and the justice, denying the notice of set-off, but admitting one, of giving in evidence, that the hiring was for 6, not 12 months. In that by the justice, the contradiction between his certificate and affidavit, was explained to arise from surprise in

the hurry of business, and conceiving the former, <sup>May Term,</sup> which was brought to him ready prepared, to relate <sup>1803.</sup> to the argument used by the defendant on the trial.

From these facts, and the tenor of the defendant's affidavits, he insisted, that as the suit below was an action on the case for damages, there could be no set-off, and that the court would not order a return, contrary to the deposition of the justice, as that would be obliging him to lay himself open to an action.

*Per Curiam*, delivered by **TOMPKINS**, J. I am of opinion, that the present motion ought not to be granted. The evidence of the notice of set-off which the defendant alleges to have been given, consists of his own affidavit, that of his counsel, and a *certificate* of the justice. To this is opposed the affidavits of the plaintiff and his counsel, and an *affidavit* of the justice, stating the notice of special matter given at the trial of the cause, to be different from the one specified in the affidavits on the part of the defendant.

The latter notice was of such matters as it was competent for the defendant to give in evidence under the general issue, and, therefore, a return of it by the justice, in addition to the general issue, would be unnecessary, and immaterial in the final determination of the cause.

The weight of evidence before us, is against the allegations of the defendant, since the *affidavit* of the justice, ought to receive greater credit than his *cer-*

May Term, 1805. *tificate*; especially as in the former, he explains the circumstances under which the latter was obtained, and his inadvertence and misapprehension at the time of giving the latter. We cannot suppose that the justice, if compelled to amend, would return any other notice, than the one to which he has now sworn, and, as I remarked before, the notice amounted to no more than the general issue.

I should not be inclined to grant the defendant's motion, if the affidavits on his part, were uncontradicted by opposite proof. The declaration below was for a tort, to which the defendant properly pleaded not guilty, and in such an action, evidence of set-off is inadmissible. It cannot, therefore, be important for the defendant to have a return of the notice which he alleges to have been given, as it would not vary the determination of the cause in this court.—Let the defendant take nothing by his motion.

KENT, C. J. gave no opinion on the point of set-off.

*Christopher Wolfe v. William Horton.*

ON *certiorari* to the mayor's court after issue joined, the plaintiff, without declaring *de novo* here, served a notice of trial for *Tuesday*, the 18th of *April*, and took an inquest at the last *New-York* sittings.

*Woods*, on affidavits showing these circumstances, moved to set aside the inquest, contending that the proceedings should have commenced anew, and a de-

claration in this court have been regularly served. <sup>May Term,  
1805.</sup> He also took an exception to the return of the writ, in certifying that a copy only was sent up, and insisted the original bill, &c. ought to have been removed. In addition to this, he urged that the notice of trial being for *Tuesday*, instead of *Monday* the 18th, was insufficient, and therefore, on this ground, as well as the others, the application ought to be granted.

*Evertson and Boyd*, contra. The practice under a *certiorari*, is to be distinguished from that on a *habeas corpus cum causa*. By the former the proceedings themselves are brought up, by the latter, only a transcript is returned. In the first case, therefore, as the original pleadings in the cause are actually before the court above, the case is taken up as they then appear, and the suit goes on, from the last step below, without any renovation. This reasoning does not apply to a *habeas corpus*. The return to that, is not of the record itself, but of its tenor ; of necessity, then, a new declaration must be filed here, for the purpose of creating a record, on which the superior jurisdiction may act. It is no argument against this reasoning to say, that the record is not in fact removed by a *certiorari*, and that, in the present instance, the very return specifies only a copy is sent up ; for, in no case are the proceedings really moved from the court below. On writs of error from the king's bench to the common pleas, the record is not actually transmitted, yet by the fiction of law, it is so considered ; and it is on this intendment, made from the nature of the writ, that the practice is founded. That the notice was

## CASES OF PRACTICE

May Term, for *Tuesday*, instead of *Monday* the 18th, is immaterial.

It was impossible the defendant could have

\* See exact-

ly the same

point in *Bat-*

*ten v. Hari-*

*son*, 3 Bos. &

*Pel.* 1.

*Per Curiam.* The last objection is a captious attempt to take advantage. The period at which the sittings were held, was a matter of general notoriety. The day of the month was right, and though that of the week was wrong, it could not, as the plaintiff's counsel have remarked, mislead, and must therefore be rejected as surplusage, for it was not necessary to state it. With regard to the regularity of the practice adopted, it is settled, that upon a *certiorari* in a civil suit, we must proceed as the court below would have done, and consider the cause in the same state here, as it was there. On the return of the writ, therefore, the cause was at issue, and nothing more required than to notice for trial. On a *habeas corpus*, the history of the cause is sent up; on a *certiorari*, the record itself. We cannot attend to the statement of the return, that it is only a *copy* which has been transmitted. In the eye of the law, this is the record; and its being called a copy in the return, cannot make us consider it otherwise. In the analogous case of a writ of error, urged on the argument, the transcript only is before the court of king's bench. But it is always regarded as the record itself. *Rex v. North*, 2 *Salk.* 565. The same principle governs the present case. Nothing is shown to take it out of the general rule. If there are merits, they ought to have appeared on affidavit. This not being done, we must hold to strict practice, and deny the motion.

May Term,  
1805.

*Thomas and Andrew Napier v. Christopher Whipple.*

THE plaintiffs' original attorney had left this state before the return of the writ; the one now employed found, on search, a rule entered to declare or be non-pressed. In consequence of which he served a declaration, received a plea of the general issue, went to trial, and obtained a verdict.

*Emott*, on an affidavit containing the above statement, and that, from having received no instructions or papers from the first attorney, he could not obtain the bail-bond given in this suit, which was taken by one of the plaintiffs, who was specially deputised to make the arrest, moved to file common bail *nunc pro tunc*, which was, after slight opposition,

Ordered accordingly.

*John Thompson and Charlora Adams v. Amaziah Payne.*

MOTION to set aside a default and all subsequent proceedings, on an affidavit of merits by the defendant, and two affidavits by the attorney and his clerk, that a notice of retainer had been duly served on the agent of the plaintiffs' attorney, but which, from misapprehension of the christian name of *Adams*, had been entitled *John Thompson and Charles Adams* against the defendant.

On the opposite side, the *attorneys* of the plaintiffs swore positively, that they had never received any

## CASES OF PRACTICE

May Term, notice of retainer in the present suit, or any other, in  
1803. the title of which the christian name of *Charles* was  
used instead of *Charlora*.

**KENT, C. J.** There must have been some mistake in this business, and as merits are sworn to, let the default and proceedings be set aside on payment of costs.

*Jackson, ex dem. Counter, v. Isaiah Giles.*

ON reading the affidavit of service, it stated the notice to have been delivered to the clerk of the attorney, without saying where.

**Per Curiam.** The service is on the face of it insufficient. We do not investigate the merits of any application, which the other side does not oppose; because we construe silence into consent, and an acknowledgment that the law is with the person moving. But we require the notice and affidavit of service to be read, because they are to conform to our own rules, all of which are known to the court. This reasoning, however, does not apply to transactions between the parties to a suit. The motion must, therefore, be denied though there is no opposition.

*Joshua Whitney v. John Crosby.*

TO a declaration on a note dated the 15th of *July*, 1803, acknowledging there was due to the plaintiff 188 dollars 90 cents on interest from the first day of *June*, with a second count for money had and receiv-

ed, the defendant assigned, as a special cause of de- May Term,  
1805. murrer to the whole declaration, the uncertainty in \_\_\_\_\_ not specifying from what *June* the interest was to accrue.

*Per Curiam.* The first count is good, because certain to a common intent. When a day or month is mentioned as antecedent, or subsequent to a contract, and the precise day or month is not specified, it means the time nearest to the date of the contract. As the money here, was payable immediately, with interest from the 1st of *June*, it must mean the preceding 1st of *June*. It can have no other interpretation. A further reason why the plaintiff must have judgment is, the demurrer is to the whole declaration, and the second count is clearly good.

*Jackson, ex dem. Russel and others, v. Stiles, Docksta-  
der, tenant.*

*Same v. Same, Freelick, tenant.*

TO set aside the default and proceedings in these causes, the defendants relied on an affidavit of their attorney's clerk, stating a service of notice of appearance and the consent rule, by leaving them, on the 17th of January, 1804, between the hours of 2 and 4 in the afternoon, at the office of *J. V. Henry*, the agent for the attorney of the plaintiffs, and that there were good and substantial defences. On the other hand, from the depositions of the plaintiffs' attorney it appeared, that Mr. *Henry* was not appointed their agent, till July, 1804; that notice of appearance, &c.

May Term, <sup>1805.</sup> had not been received ; that in one suit, a writ of possession had been sued out in *May* term of that year, and executed in the vacation following, and that in the other, the tenant had compromised and bought the land of the lessor of the plaintiff.

SPENCER, J. The affidavits go only to there being defences, but this is no evidence of merits. The proceedings have been perfectly regular on the part of the plaintiffs, and nothing appears from whence a mistake could have arisen. The applications must, therefore, be denied.

*Peter Brooks v. Abijah Hunt.*

ISSUE had been joined on the first of *March* last, but the cause, the *venue* of which was laid in the county of *Albany*, had not been brought on at the last *April* circuit.

*Sanford*, on these facts, moved for judgment as in case of nonsuit.

*Paris*, contra, showed, that the defendant had delayed the cause by obtaining time to plead till the first day of *March*; that from the matter of the plea then delivered, there was reason to believe it would be necessary to *subpæna* witnesses from *New-York*; and that from the short interval between the receipt of the plea and the circuit, he had no opportunity of consulting with the plaintiff, who resided in the most westerly part of *Montgomery*. From these circumstances, he argued that the motion ought to be denied without either costs or stipulation.

*Sanford*, in reply. The words of the statute\* are, May Term,  
1805. that where issue is joined and the plaintiff "neglect "to bring such issue to be tried according to the "course and practice of the court," the defendant shall be entitled to judgment as in case of nonsuit. From the 1st day of *March*, to the circuit in *April* was time enough to notice.

\* 1 Rev.  
Laws, 353.  
sec. 12.

*Per Curiam.* The defendant had a right to move, and, therefore, though we deny his motion, it must be on payment of costs; but, from the circumstances of the case, the plaintiff is excused from stipulating.

THOMPSON, J. I do not think this according to practice. The cause was long enough at issue to allow of a notice, and he ought, therefore, to stipulate.

\*\*\* It was said by the bench, that in all cases the period within which costs are to be paid is twenty days.

*Myndert Lansing v. David Horner.*

EMOTT moved to set aside the default entered the 21st of *January* last, and the judgment and execution thereon, upon the affidavit of the defendant swearing to merits, and one from his attorney, stating that notice of retainer and of special bail had been in due time transmitted with the bail-piece by the mail, to his agent in *Albany*, desiring him to serve them on the attorney of the plaintiff, and that he himself had never received a declaration.

May Term, 1805. *Bleecker*, contra, read an affidavit, setting forth that he had never received any notice of retainer or bail, and that he had proceeded regularly.

KENT, C. J. As the papers were sent to the party's own agent, why does not he show that he has not received them? This was his duty, and the not doing so is a palpable neglect. There is also a *laches* in not applying last term. The defendant can take nothing by his motion.

*Lewis Du Boys v. Henry Fronk.*

SANFORD moved to change the *venue* in an action of covenant, from *Dutchess* to *Montgomery*, on an affidavit stating that he had a great number of witnesses, all of whom, excepting one in *Rensselaer*, resided in *Montgomery*.

*G. Van Ness*, contra. The action is transitory.

KENT, C. J. We last term decided, that where the body of witnesses resided in a county different from that in which the *venue* was laid, we would change it on the application of the defendant, unless the plaintiff show that he has witnesses where the *venue* is laid. Take your motion.

*Cornelius C. Beekman v. Benjamin Franker.*

IT was ruled that ignorance of the necessity of employing an attorney, previous to the trial of the cause, is not sufficient to induce the court to set aside

a regular default and subsequent proceedings, though May Term,  
1805. accompanied with a strong affidavit of merits.

*James Woods v. Ephraim Hart.*

BOGERT moved to set aside the inquisition assessing very small damages, on account of the sheriff's having permitted a person to remain and converse with the jury, whilst deliberating on their verdict, though known to be inimical to the plaintiff, and rejected as a juror on that account.

*Hoffman*, contra. On inquests, after a default, confessing a cause of action, there never is the same regularity, as on a trial where the very right is questioned. It is not alleged that the man who remained with the jury spoke adversely of the plaintiff, or used any means to lessen the amount of damages.

*Bogert*, in reply. On an inquisition the law is as jealous of the conduct of jurors as on a trial, 4 D. & E. 473.\* The oath of the constable is the same, and shows the same conduct is required in one case as the other.

\* *Stainton v.  
Bedle.*

KENT, C. J. No one ought to mix with a jury whilst deliberating. They should, to preserve the purity of justice, be kept by themselves, and on this point there is no difference between an inquiry before the sheriff, and a trial. The inquisition must, therefore, be set aside, each party paying his own costs. We order it thus, because neither party is to blame ; and, were we to direct them to abide the event of the

May Term, suit, it would, in fact, as there has been a default, be saying the defendant is to pay them. This case, therefore, is to be distinguished from that of granting a new trial after verdict, for the misbehaviour of the jury. There, each of the litigants has a chance in his favour, and ordering the costs, on such occasion, to abide the event of the suit, does not, necessarily, impose them on either. Here the event is known.

*James Howell v. Daniel Denniston.*

THE plaintiff in this cause filed his declaration *de bene esse*, and entered his rule to plead on the return day of the writ on which the defendant was taken, but the writ was not, in fact, returned till seven days afterwards.

*Blake*, on these grounds, moved to set aside the default and all subsequent proceedings.

*Emott*, contra.

**KENT**, C. J. The rule to plead was irregularly entered; because, until the writ be returned, bail filed, or an appearance entered, there is no basis for a proceeding, and the court has no cognizance of the cause, so as to authorise pleadings. With respect to their being no merits, we never regard that, when the application is for irregularity.

*Matthias and James Bruen v. Adams and Merrill.*

WOODS moved to set aside an inquest taken early in the last New-York sittings, in the absence of

the defendants' attorney, on an affidavit stating that <sup>May Term,  
1805.</sup> the demand was for more than was actually due, and the cause stood so low down in the calendar as No. 116.

*T. L. Ogden*, contra, read a deposition showing, that the attorney for the defendants had acknowledged delay would be desirable, under their then embarrassed circumstances, and that a frivolous demurrer had already been filed and overruled. He contended also, that the affidavit of the defendants was insufficient, in not expressly averring there was a defence.

*Woods*, in reply. The same thing is in substance done. All inquests at a circuit are at the peril of the party. *Roosevelt v. Kemper, ante*, 341.

THOMPSON, J. The practice I adopted was, that if the defendant's counsel said there was a defence, I did not allow it to be taken.

*Per Curiam.* The affidavit is defective in not saying there is a defence "as advised by counsel." In this case there has been a frivolous demurrer, and that is a very suspicious circumstance. The defendants, therefore, take nothing by their motion.

*Jonathan Holmes v. Elisha Williams.*

THE defendant, in a suit against the plaintiff, the *venue* of which was laid in *Albany*, had obtained a judgment in which the costs awarded were nine dollars 12 cents, and on the supposition that the original

May Term, 1805. *ex. sc.* had issued into *Columbia*, sued out a *testatum ca. sa.* inserting 14 dollars 44 cents. The now plaintiff having been taken on this writ brought the present action for false imprisonment.

*Williams*, on an affidavit disclosing the above facts, and adding that he did not personally issue the execution or ever see it, or knew of the mistake till the 6th day of the present month, moved to amend the *testatum ca. sa.* by expunging the 14 dollars 44 cents, and inserting 9 dollars 12 cents.

*Van Wyck*, contra. This is an application in one suit, to amend mistakes and errors in another. If the amendment is to be in the cause of *Williams v. Holmes*, the papers ought not to be entitled in that of *Holmes v. Williams*. The motion goes to take away the basis and foundation of our action.

*Per Curiam.* Take your motion.

*Robert G. Shaw and Christopher Barker v. Robert Colfax, William Colfax and Alexander Richards.*

ON the last day of *February* term, the defendants, *Robert Colfax* and *Alexander Richards*, entered a default against the plaintiffs for not declaring.

*Hopkins* moved to set it aside, together with the subsequent proceedings on these facts.

In *November* term last, the *capias* issued was returned "taken," as to *Robert Colfax* and *Alexander Richards*, and "not found," as to *William Colfax*, to

prest whom, several ineffectual attempts had been made, as he resided in *New-Jersey*, and either did not come into *New-York* at all, or did it so secretly as to avoid the process sued out, but on that account, the idea of proceeding against him, was not relinquished; on the contrary, an *alias capias* had been sued out, under the belief that he had received information of the former writ, but before it was issued a rule to declare against the other two defendants had been served, upon which the present default had been entered.

He argued that at common law, the plaintiff could not proceed till all the defendants were brought in; and though by statute,\* a different practice might be pursued, still it was at the election of the plaintiff, and therefore, no advantage could be taken of the omission. For this he cited *Tidd's Practice*, 376—9.

\* Act for  
the amend-  
ment of the  
laws, 1 Rev.  
Laws, 333.

*D. A. Ogden*, contra. Had the proceeding been by original, the authority relied on might have applied, but as it is by bill, the plaintiffs have placed themselves in the same situation, as if all the defendants had appeared. If necessary that all the defendants should be brought in, the plaintiffs should have obtained an order to enlarge the time for declaring. According to the practice now contended for, a defendant may be kept under bail for his life.

*Hopkins*, in reply. Whether the proceeding is by bill, or original, is immaterial. The distinction is whether the suit be in trespass or on contract. In the former they may sever, in the latter they cannot; as

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they therefore must be proceeded against jointly, they cannot separately nonpross. Suppose the only solvent defendant not to be taken, must a plaintiff go on against a person from whom nothing can be recovered? The inconvenience alone of such a principle, is a sufficient argument against it.

*Per Curiam.* The plaintiffs should have applied for further time to declare, and shown either that they were endeavouring to bring all the defendants into court, or pursuing one to outlawry. That would have been a good ground to enlarge the rule from time to time. Not having done so, and being authorised by our act to proceed against the defendants brought in, the plaintiffs were liable to be nonprossed equally as if all the defendants had been before us.

*Robinson and Hartshorne v. Fisher.*

TO a declaration on a promissory note, the defendant pleaded in bar, that the *assumpsit* was by him and *Robinson* jointly, and not by him separately.\* The plaintiffs' attorney considering the plea a nullity, entered a default.

*Woods* moved to set it aside, and cited in support of the plea a precedent in 3 *Went.* 114. He said also, no plea could be treated as a nullity, unless it appeared on the face of it to be frivolous. In all other

\* See *Mainwaring v. Newman*, 2 *Boo. & Pull.* 120. in which such a plea as the present was held good on demurrer, on the authority of *Moffat v. Van Millingen and others*, E. 27 G. III. B. R. declaring that the matter was not pleadable in abatement.

cases the court would drive the defendant to his de- May Term,  
murrer. 1805.

*G. Ogden*, contra. The matter of this plea is clearly in abatement; and if so, might, for want of being verified by affidavit, be treated as a nullity. 1 *Sell.* 301.

*Per Curiam*, delivered by *LIVINGSTON*, J. This is a dilatory plea, the definition of which is, that it only delays the suit by questioning the propriety of the remedy rather than by denying the injury. Thus the injury complained of here, is not denied, but that it was committed with another. If it be a plea of this description, it wants the verification required by statute, and is therefore bad. Even as a plea in bar, I should not be for countenancing it, for it is totally out of the usual form of general issue which it was intended to try, and which would have answered as well, and furnished a record in the common form.

*Paul Schenk and Henry Ten Broeck v. Melanchton  
Lloyd Woolsey.*

IN *scire facias*, to revive two judgments, one for £4,224, the other for £1,718, obtained in 1783, inquests had been taken at the sittings in December, 1803.

*D. A. Ogden*, under an agreement that the application should be considered as in time, moved to set them aside on affidavits, which contained in substance these facts.

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The defendant, who lives at *Plattsburg* in the county of *Clinton*, was in 1785, duly discharged under the then insolvent law of the state. In *February*, 1803, the declarations were filed, to which payment was pleaded, with notices subjoined of giving the discharge, &c. in evidence; but as, on procuring a copy of the proceedings under the insolvent law, the discharge itself could not be found, the attorney of the defendant wrote to him in the *August* following, communicating this circumstance, and requesting him to make inquiry after it. On the cause being noticed for trial on the 12th of *December* in that year, the defendant's attorney again wrote to him, repeating the contents of his former letter; and urging him to attend personally, that measures might be taken to procure the discharge, or substantiate by parol evidence its former existence and loss. The first of these letters did not reach the defendant till the middle of *September*, the latter not till the 29th of *November*, then next. To each of these the defendant replied, stating that in consequence of a fractured leg, he was utterly unable to travel, and desiring the trial to be postponed till the *February* following, as, by that time, he hoped to be able to procure the discharge, which had been given to Mr. *Du Boys*, the then sheriff of *Dutchess*, to warrant his release from confinement. The first of these answers never came to hand, and the latter which was received bore date on the 18th of *December*; but though the discharge itself was not found, the attorney employed for the insolvent, who was also assignee of his estate, swore that the discharge had been obtained on a due and full adherence to the requisites of the act, and that he was then petitioning congress for the lands to which

the defendant was entitled, as an officer in the revolutionary army, in consequence of their having passed by the assignment of the insolvent's estate. None of these circumstances, however, appeared when the inquests were taken ; for the counsel of the defendant, when the causes were called on, refused to answer the court whether there was any defence, thinking that he was not bound to do so, and in consequence of this silence the inquests were taken.

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1805.

*Per Curiam*, delivered by SPENCER, J. The inquest is regular. Counsel, if present, ought to answer whether he believes there is a defence. The time at which a trial shall come on, is not the privilege of a defendant, but is adopted from a regard to the seniority of issues. Infinite delay would take place in cases where no dispute exists, if the counsel were to be mute when required to state whether there be a defence. It appears, however, that the defendant has been discharged under an insolvent act, and by accident has not been able to produce his discharge to his attorney. But though the court will not decide in this way, whether parol evidence might or might not be given of its loss and contents, yet they will regard the peculiar situation of parties. In this case the defendant lives remote, and was from that circumstance, and infirmity, prevented from attending to these suits at an earlier period. The moral obligation, under which the defendant is supposed to labour of paying his debts, is not to operate with the court, unless a new liability has been incurred. From the misconception of counsel, the remote distance of the defendant, his infirmities, and his having a merito-

May Term, 1805. rious defence, the court grant the application upon payment of costs.

*Anonymous.*

The court refused to permit the general issue to be withdrawn to let in a plea of coverture in abatement, delivered after service of the general issue, though the defendant swore the general issue was pleaded without his knowledge, by a person he never meant to retain as attorney, and the plea in abatement was delivered in due time.

*Samuel Bayard v. Samuel B. and Richard M. Malcolm.*

THE notice of motion was not for the first day of term.

*Munro* accounted for this by an affidavit, stating that he had absolutely forgotten the day on which the term commenced, imagining it to be one week later than it really was.

*Harrison*, contra, objected to the reception of this excuse, as Mr. *Towt* was the attorney on the record, therefore for him the forgetfulness of Mr. *Munro* could afford no excuse.

*Per Curiam.* There can be no doubt of the mistake, nor but that the whole is in good faith.

Though Mr. *Towt* appears the attorney on record, every one knows the connexion between him and

Mr. Munro. He is to be supposed to act only under ~~May Term,~~  
the direction of Mr. Munro.  
~~1806.~~

*Samuel Stryker v. Thomas Turnbull, Robert Denton  
and Bernardus Voorhees.*

HARISON, on behalf of the defendants, moved for a foreign and struck jury, to be taken from the city and county of *New-York*, on an affidavit, stating that the suit was prosecuted at the joint expense of the inhabitants of the town of *Gravesend* in *King's county*, who had combined for the maintenance of a supposed right, claimed by them as inhabitants of the said town, of erecting huts for the purpose of fishing, upon the lands of the defendants; of taking and heaping up sea-weed, and carrying it away at their pleasure, and that other claims and disputes, in some respects of a similar nature, exist in the neighbouring county of *Richmond*.

*Baldwin*, contra. The same principle would warrant the application in most insurance causes. Those interested in a point, contribute their *quotas* towards the defence. No more is done here. But why not take the jury from *Queen's* or any other county on *Long-Island*?

KENT, C. J. This is a cause in which the right of fishery will come in question. Where the counties are so small as these mentioned, an impartial trial cannot be had, on a claim of a general nature. *New-York* is as near as any other, and where a right of fishery, or any similar claim is to be litigated, it is, in my

May Term, 1805. *opinion*, sufficient to take the matter from a *Long-Island* jury. The expense is at the door of the party who applies, and the contribution to support the suit, shows strongly the disposition of the county.

*The People v. Jesse Burdock and Jonathan Case.*

AN indictment found against the defendants for a forcible entry and detainer, in *April* term, 1798, had, on being removed into this court, been quashed, and restitution ordered, but the record of it could not, on search in the clerk's office, be found.

*Riker* applied for leave to file a record *munc pro parte*, on an affidavit by the attorney employed in the prosecution, disclosing the above facts, and that, on an examination of his register, he found not only that a record had been duly filed, but that he actually obtained an exemplification of it, which had been lost.

Granted accordingly.

*Daniel Delavan v. Jonas C. Baldwin.*

MOTION by the defendant, to change the venue from the city and county of *New-York*, to *Onondaga*.

In *November* last, at which time the plaintiff was entitled to enter a default for want of a *plea*, notice of a similar motion was given, but from the papers not having been received in season by the agent of *Baldwin's* attorney, the application was not then made.

IN THE SUPREME COURT.

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In April a plea of the general issue was given and received. May Term,  
1805.

*Munro*, contra. The defendant is too late.

KENT, C. J. I am of opinion the venue ought to be changed as there has been no loss of trial, and there will be no delay. This I think ought to be the regulating principle, as these applications are to the discretion of the court.

LIVINGSTON, J. I am against departing from the practice, by which defendants are restricted from making these motions after plea pleaded. Nor do I think there is a sufficient reason for not having asked for this favour in November last. But what weighs greatly with me is, that the application is on the eve of a circuit, and may impose rather hard terms on the plaintiff.

SPENCER, J. I concur in the sentiments of my brother *Livingston*.

THOMPSON, J. The only difficulty in my mind, was with regard to this request being after issue joined, subsequent to which, all increase of expenses ought, if possible, to be avoided. But as no delay will be created, I think we ought to grant the rule, and had the plaintiff shown any hardship likely to arise from it, we might have imposed such terms as to prevent any injury. The *laches* I consider to have been entirely waived by accepting a plea.

May Term,  
1805. **TOMPKINS, J.** That is the opinion I entertain.  
When a plaintiff receives a plea which he is not obliged to take, he cures the antecedent *laches*. I agree therefore with the Chief Justice and Mr. Justice *Thompson*.

*James Roosevelt v. Daniel S. Dean.*

AFTER a long and desultory argument, the counsel for the plaintiff took an exception to the titling the notice of motion, and affidavit on which founded.

*Per Curiam.* All objections of this sort ought to be submitted as preliminary questions. We are not to sit here, have the grounds of motion laboriously investigated on a long discussion, and then have a matter of mere form pressed upon us. The entering into the argument is a waiver of all objections against its coming on.

\* \* \* The court in this cause said, that when an affidavit does not state that which ought to be alleged in support of the motion, the presumption is, it could not be asserted, and the inference of the bench will be against the party guilty of the omission.

*Jackson, ex dem. Rachael Lewis and others, v. John Van Loon.*

WOODWORTH moved for a commission to be directed to persons in this state, to take the examination of witnesses in *Pennsylvania*.

*Riggs* against its being allowed, urged the direction. May Term,  
1805.

*Per Curiam.* The act\* does not specify, that the commissioners should live in the state to which the commission is addressed.

\* For the amendment of the law, 1 Rev. Law, §51. sec. 11.

Take your motion.

*Anonymous.*

THE application was for a rule ordering a justice to return certain parts of the conduct of the jury which it was said amounted to misbehaviour.

*Per Curiam.* The justice is not answerable for this, nor was it a matter before him. We cannot order him to return that, over which he had no judicial controul, and which was never submitted to him,

*Radcliff and Davis v. the Marine Insurance Company.*

THESE points were ruled: 1st. A judge may grant and annul his own order to stay proceedings on a case made as well in term as in vacation, and this, though a rule for judgment be entered, the decision in *Shepherd* ads. *Case, ante*, p. 94, applying to judgments perfected. 2d. If a judge has granted an order to stay proceedings on a case made, on account of an improper item allowed by a jury, and he declare this to have been his only reason, the court may, on such item being relinquished, vacate the order.

May Term,  
1805.

*Bird, Savage and Bird v. Pierpoint.*

A CASE having been made, after a verdict in this cause for a very considerable sum, the justice of the demand to which was not so much questioned, as whether it should be paid to the plaintiffs, or the assignee of one of them ;

*Radcliff*, on an affidavit showing that the debt was actually due, moved for liberty to enter up judgment, in order to bind the lands of the defendant.

*Riggs and Hoffman, contra.*

*Per Curiam.* We are all of opinion that you can take nothing by your motion. There would be no limitation to this kind of practice. It would be asked in every cause, and in every stage. A verdict is no evidence of right; in many cases no more than filing the declaration. To the country at large such a principle would operate very injuriously. In the English courts such a measure has never been attempted, though from the practice of directing, in important cases, two and even three arguments, the delay must sometimes be very great. It is a mere matter of possibility where the justice of the case is. To make a rule here, we must do so in all cases, and the result would be, that wherever there was a certificate to stay proceedings, it would be followed by a judgment. The plaintiffs show no right to the debt, though it may be due, and as to the sum, 100 dollars to some persons are of as much importance as 1000 dollars to others. We therefore deny the application, with costs for resisting.

May Term,  
1805.

*Giles v. Caines.*

AFTER noticing for trial, it was discovered that the defendant's attorney had not filed the plea, a copy of which he had delivered; the plaintiff therefore entered a default as for want of a plea. To set aside this, the defendant noticed for the first day of term, but having obtained no order to stay proceedings, and not bringing on the motion upon that day, the plaintiff duly executed a writ of inquiry. On these facts, and a strong affidavit of a good and substantial defence upon the merits,

*Caines* moved to set aside the default and all subsequent proceedings. There was a distinction to be taken he said, between the circumstances here, and those in *Shepherd* ads. *Case, ante*, p. 94. There, the plaintiff had done no act to waive the default, and therefore as it stood in full force, his perfecting his judgment afterwards was regular; but in the present instance, he had, by joining issue and noticing for trial, waived the mere form of filing the plea, and had no default on which to rest. He had himself knocked away the foundation on which he stood. As to the want of filing the plea, that was from a mere form, and the court would order it to be done on the suggestion of the plaintiff himself. *Cohan* ads. *Kip, ante*, p. 50.

*Evertson*, contra. This is not to be distinguished from *Shepherd* ads. *Case*. The plaintiff could not waive that which he did not know.

May Term, 1805. *Per Curiam.* The omission of filing the plea, not being known when issue was joined, or the cause noticed, cannot be cured by those acts. The principle therefore of *Shepherd* ads. *Case*, applies. Though there is a strong affidavit of merits, we can relieve only on terms ; those must be payment of costs, and filing the plea *instanter*.

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AUGUST TERM, 1805.

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*Deodatus Clark v. Isaac Frost and Wife.*

SIMONDS, on an application to set aside a default and all subsequent proceedings, relied on an affidavit made by the defendants' son, setting forth an agreement to stop all further measures in consequence of a settlement then made, and showing, as a cause for the deposition being by the son, that his parents were so old and infirm they could not go to a commissioner to be sworn, but that he, the deponent, having been employed to take care of their interests, was perfectly acquainted with the merits of the cause, and all that had taken place.

*Gold*, in opposition, read four depositions flatly contradicting the settlement, and the inability of the defendants ; and also stating the deponent on their behalf, to be a person totally devoid of all credit. He

also contended that the motion ought to be founded <sup>Aug. Term,  
1805.</sup> on the affidavit of the party ; therefore, *that* by the son ought not to have been read.

*Simonds*, in reply, offered affidavits to support the character of the son, by showing the settlement he mentioned had actually taken place.

*Per Curiam.* We will allow affidavits, or other documents, to be adduced to establish the general reputation of a person whose character has been impeached, but we cannot hear any thing supplementary read, to substantiate the ground of motion. Copies of all that is relied on for such a purpose, should be served. In the present instance, the incapacity of the defendants is denied ; and when a third person makes an affidavit, a sufficient reason should be shown, why it was not by the defendant himself.— Besides, a commissioner ought to have gone to their house ; and was the affidavit of their son to be received, it would still be insufficient ; for it should have set forth what settlement was made, as it might have been conditional. Take nothing by your motion, and pay the costs of resisting.

*Elijah Ranney v. Joseph Crary.*

IN a former term, this cause had, after joinder in error, been brought up for argument; but the court observing that the justice had made no return to the *certiorari* attached to the papers, directed a rule, ordering one by the first day of the next term. Before a service of this could be effected, the justice

~~Aug. Term, 1805.~~ had quitted the state, and had never returned within it.

*Breese*, for the defendant, now moved to nonpress the writ, and have his costs allowed.

*Per Curiam.* Why did you join in error? Your costs are of your own seeking, and without any fault in the plaintiff. You may sue out execution on your judgment below; but the plaintiff must have liberty to discontinue without costs.

*Reed v. Bogardus.*

WHERE a judge cannot try a cause, or a circuit falls through, the costs abide the event of the suit.

*John Holmes v. Flisha Williams.*

THE affidavit of service of notice, stated it to have been by leaving it at the dwelling-house of the agent of the attorney.

*Per Curiam.* It is not sufficient. You ought to have stated that the agent was absent, and to whom delivered.

*Garrit Bogert v. David Bancroft.*

WILLIAMS moved in this cause, on a notice signed by himself, "for A. B." the attorney.

*W. P. Van Ness* excepted to the signature, as not being that of the attorney himself.

*Williams* in reply. He is in embarrassed circumstances, and could not be found. But independent of this, the signature is sufficient. Stipulations signed by counsel alone, have been held good :\* so his subscription to a case made at a circuit, is sufficient.

Aug. Term,  
1805.

\* *Wilcox v.  
Woodhull*.

*Per Curiam.* Under the circumstances of this case, we think the signature sufficient. But we do not by this mean to say, that subjoining the name of a counsel in the cause, is, in these incidental proceedings, adequate to that of the attorney. We rather think it is not.

*Jackson, ex dem. Fisher, v. Ferguson.*

ON a motion for judgment, as in case of nonsuit, after due service, and when the attorney was in court, the counsel for the plaintiff asked till the next non-enumerated day, to prepare an affidavit in opposition.

*Per Curiam.* To entitle to such a favour, some reason should be offered, evincing why the affidavit could not be prepared ; because the period of service ordered by the rules of the court, is, otherwise, presumed sufficient to enable the party to be ready. The effect of the motion cannot, therefore, be delayed.

*The President and Directors of the New-Windsor Turnpike Road v. Wilson.*

FISK, in an action for running a road parallel to that of the corporation, in order to draw off and im-

## CASES OF PRACTICE.

Aug. Term, 1805. *jurors* the tell, moved to change the *venue* from *Orange* to *New-York*, on an affidavit stating that from the prejudices of the county against turnpike roads, an impartial trial could not be had.

*Per Curiam.* It is impossible to conceive, that in so large a county as *Orange*, twelve indifferent men cannot be obtained to try a cause against an individual, for his sole act. In such small counties as *Richmond*, where fishery rights are concerned, in which almost the whole community is interested, the general dispositions of the people may warrant the application; but if it be allowed in the present instance, on every turnpike cause we shall have similar requests. Why not go into *Dutchess*, if it were necessary to take the trial to another county? The present motion must be denied, though the reason on which it is founded, might be a good reason for asking a struck jury.

*Jackson, ex dem. Root, v. Stiles, Vanbuskerk Tenant.*

IT was ruled in this cause, that the jurats of affidavits taken before judges of the common pleas, or commissioners, must be signed by them, with the addition of their official descriptions; judges of the common pleas to stile themselves such, and commissioners to specify that they are so.

*Brooks v. Hunt.*

*HENRY* moved for judgment as in case of non-suit on an affidavit, merely stating for "not bringing

"the cause to trial at the last circuit, in and for the Aug. Term,  
"county of *Montgomery*," according to the practice 1805.  
of the court.

*Paris*, contra, objected that it did not specify where  
the *venue*\* was laid.

*Henry* insisted it appeared from irresistible im-  
plication, to have been in *Montgomery*.

*Per Curiam*. The affidavit is defective. Had  
this cause been with a *venue* in *New-York*, the same  
mode of swearing would have entitled you to your  
judgment. We are not to infer facts from affidavits,  
when the party has it in his power to state them posi-  
tively. The motion must be denied.

\* This in-  
gredient is  
not required  
by the Eng-  
lish practice.  
See *Tidd's*  
*Forms*, 194.  
1 *Sess. Pract.*  
365. c.

*Jackson, ex dem. Cobley, v. Valentine.*

WHERE on the last day but one of a circuit,  
there appear so many old causes to be tried, that the  
judge himself is of opinion that a young issue  
could not be brought on, and, from this conviction,  
so many of the suitors go home, that an un-  
expected opportunity offers of trying a cause, the  
plaintiff in which had with his witnesses, left the  
circuit, the court said, he was not in default, and,  
on a motion for judgment as in case of nonsuit, not  
only refused the application, but excused from costs  
and stipulation.

Aug. Term,  
1805.

*Kibbe and Titus v. Stoddard.*

EMOTT moved in this cause for judgment on a frivolous demurrer, on which account he claimed a priority, upon a simple notice of bringing on the cause to argument.

*Per Curiam.* Your notice should have stated that you meant to apply on account of the frivolousness of the demurrer, otherwise you cannot gain any preference.

*Williams v. Green.*

IT was ruled that a circuit court cannot order a cause to be referred under the statute.\* That any award, therefore, under a rule for a reference granted at a circuit, must be set aside, but without costs, as the rule, though a nullity, is an act of the court.

\* Act for the amendment of the law, 1 Rev. Laws, 346. sec. 2.

*Coffin, Executor, v. Tracy.*

IN error from a 10 pound court, the defendant relied on the now plaintiff's having confessed judgment in the inferior tribunal, and, therefore, this case was distinguishable from those, in which the court had determined an executor could not sue before a justice of the peace.

*Per Curiam.* Consent will take away error, but neither that nor confession will give jurisdiction.

N. B. This cause was tried in the court below before the act of the last session.

*Shadwick v. Phillips.*Aug. Term,  
1805.

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ON an application for judgment as in case of non-suit for not proceeding to trial, the affidavit stated, that the plaintiff, as he was going to *subpæna* his witnesses, met the defendant, who said he could not procure his in time, and begged him not to bring on the suit. This he consented to, and the verbal agreement thus made, it was insisted, took the case out of the operation of the twelfth rule of *April*, 1796, which it was argued, was obligatory only on officers of the court.

THOMPSON, J. The simple question is as to the validity of the agreement; whether the court is not bound to notice it, though not reduced to writing? Our rule\* is, "That no private agreement or con-  
\* See ante,  
p. 7.  
"sent between the *parties*, &c. shall be alleged or  
"suggested by either of them against the other, un-  
"less the same shall be reduced," &c. We think  
that it ought to extend to parties, as well as attorneys  
in the suit. Such must have been the intention of the  
court; otherwise it would have been restrained to  
such as were entered into between attorneys. The  
words of the rule warrant our determination. It is  
as necessary between parties as their attorneys, and  
enforcing this construction will prevent much alterca-  
tion. There is no difficulty in reducing any agree-  
ment into writing. In the present instance, indeed,  
the existence of the engagement is not contradicted,  
but it is not admitted; and if it be of no validity, it  
was unnecessary it should be denied. There may

Aug. Term, 1805. be a hardship in this case, but the court cannot violate what they think a proper and correct rule to enforce. But even the hardship will in some degree disappear, if we advert to the affidavits, which state that the parties informed their attorneys of the arrangement. It was, therefore, their duty to go on, notwithstanding what passed between their clients.

SPENCER, J. I cannot coincide in this decision. It is true, with the general law of the land no man is supposed to be unacquainted, and, therefore, ignorance of it is no excuse. But this presumptive knowledge is not to be extended to our private rules of court. Our officers, indeed, may be supposed connusant of them, for they are intended to be always present here in person. In the case now before us, the rule operates most unjustly. A plaintiff on the way to *subpæna* his witnesses, meets a defendant, and to oblige him, because he could not be ready with his, consents not to bring on the cause, and merely on account of this agreement not being reduced to writing, he is now to be nonsuited. I think the practitioners in this court were the subject matter of the rule, and it ought to affect them only.

TOMPKINS, J. I fully concur in the opinion last given.

LIVINGSTON, J. I did not intend to have given my reasons for coinciding with the decision pronounced by Mr. Justice *Thompson*. But to me it appears of more importance that the rule should apply to parties than attorneys. The latter, if they abide honourably by their engagements, know exactly the

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extent of them, and to what they apply ; but a suitor can hardly ever determine the effect of his own words, and we shall have eternal disputes upon how far they mean to go. The construction now made, is clearly within the letter of the rule, and were it to be made anew, I should be for its comporting with the present decision.

Aug. Term,  
1805.

KENT, C. J. The defendant takes nothing by his motion.

*Fall and Smith, Overseers of the Poor of New-Windsor, v. John Belknap.*

IF an affidavit of service state, that the party did serve his opponent with *notice* of bringing on the cause to argument, it is, without setting forth or producing the notice itself, sufficient to entitle to judgment, if the opposite side do not attend.

*Brandt, ex dem. Palmer, v. Berrian.*

THIS was an application for the costs of the last circuit at *West-Chester*, upon an affidavit, that just as the plaintiff was ready for trial, the defendant verbally agreed to leave the matter to arbitration, which he had since refused to do, though, from a reliance on his promise, the cause was not brought on.

Munro admitted all the facts, but said he was not authorised to consent to the motion.

Aug. Term,  
1805.

*Per Curiam.* When an agreement, though by parol, is admitted, and its being merely verbal not urged against it, or relied on, it ought to have its effect. But in this case, the plaintiff is premature in his application. He must wait till the costs of suit are taxed, and then he will be entitled to them.

*Jackson, ex dem. Rosekrans, v. Howd.*

THE affidavit of service was by the attorney on information from his clerk, that it had been duly made, according to an indorsement on the notice produced, made by the clerk who had quitted this state, and gone into *Connecticut*, where he then was.

*Per Curiam.* The affidavit is sufficient, and as full as the circumstances of the case would admit.

*Stephen Olney v. Ebenezer Bacon.*

AN order had been obtained, on behalf of the plaintiff, to stay proceedings till the fourth day of last term; for the purpose of affording an opportunity to move for a rule, directing the justice, in the court below, to amend his return, by inserting a written document adduced in testimony before him. By some accident, the attorney entrusted with the papers, did not arrive in *New-York* till after the fourth day, and on the sixth, the defendant entered a default against the plaintiff for not assigning errors according to notice, after which, the plaintiff, on the last day of the term, obtained his rule to amend, no one appearing to oppose.

*Woodworth*, on these facts detailed by affidavit, <sup>Aug. Term,  
1801.</sup> moved to set aside the default and subsequent proceedings.

*Foote*, contra, relied on a stipulation entered into between the attorneys in the cause, by which it was agreed, that the written evidence referred to in the return was the order or draft therein mentioned. This he contended was adequate to the amendment to be moved for, and superseded the necessity of application; therefore, errors not being assigned at the time the order expired, the defendant was regular in his default.

*Woodworth*, in reply. The stipulation reached only to the identity of the paper, the mere production of which was not evidence, and the object of the motion was to procure a return of it, to show it was no testimony, without being corroborated by witnesses. Besides, when a party does not appear to oppose, he waives all objections. *Ekhart v. Dearman, ante,* p. 422.

*Per Curiam.* The stipulation was defective, for the object of the plaintiff could not have been obtained by it; nor does it state to have been made with a view of superseding the necessity of an application to the court. But the order to stay proceedings, having in fact expired before the default for not assigning errors was entered, the defendant was regular; though, as there has been some misapprehension, and a delay from accident, it must be set aside on payment of costs and assigning errors in twenty days.

Aug. Term,  
1805.

*Teunis Quick v. Benajah Merrill.*

IT did not appear that notice of retainer of attorney for the defendant, had been received, but notice of bail was admitted, an exception to which was taken, (on a motion to set aside a default, and other proceedings, accompanied by an affidavit of merits,) that it was entitled "*Benajah Merrill ads. Teunis Quick;*" and the want of notice of retainer was also urged.

*Per Curiam.* Notice of bail, necessarily imports a notice of retainer as attorney. As to the title of the notice, the ruling principle is, that if the party served be not misled, or the papers be not such as evidently *may* mislead, a mere clerical misprision shall not prejudice. It does not appear, that there was any other cause depending against *Merrill*. In liberal practice, the notice ought to have been received, and the objections must, therefore, be overruled.

*Abraham Boyce v. Reuben Morgan.*

IN error on *certiorari*, upon an agreement entered into, on the 28th of *December*, not to sue a third person, the *gravamen* was laid, that he, *since that time* had sued, and the summons was dated on the day of the agreement. On this, the defendant below insisted on a nonsuit; but the plaintiff refusing to submit to it, a verdict was given in his favour. It was now contended, that the levying the plaint was the commencement of the suit; but the court, on the authority of *Lowry v. Lawrence, ante*, p. 170.

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ruled, that issuing the summons, or warrant, was the beginning of the action, and reversed the judgment; the suit appearing on the face of the record, to have been instituted previous to any cause of action accrued.

Aug. Term,  
1805.

*Jackson, ex. dem. Norton, v. Stiles, Grover Tenant.*

RUSSEL moved to set aside the default and all subsequent proceedings, on an affidavit admitting due service of the declaration and notice, but adding that he thought the supreme court, at which he was noticed to appear, sat at *Salem*, in the county where the lands in question lie; nor did he know to the contrary till a few days before the circuit court, when he was first informed that the supreme court did not sit at *Salem*, and that the court held there was only for the trial of issues joined in the supreme court, and that he had a good and substantial defence.

*Shephard*, contra, insisted that the sittings of the supreme court being regulated by statute, were matter of general notoriety, and therefore no excuse was shown for the default. Besides, there had been a loss of a trial.

*Per Curiam.* This is in ejectment: were we not to interfere, the possession would be changed. Take your motion on payment of costs.

*Wilson v. Guthrie.*

ON an affidavit by the defendant, that when served with the writ in this cause, he supposed the suit

Aug. Term,  
1805. to be in the common pleas, and had "a substantial defence," corroborated by the deposition of his attorney, that he was retained to defend upon information by the defendant that the suit was in the common pleas, and knew not to the contrary till he gave notice of retainer, the court set aside a regular default and subsequent proceedings upon payment of costs.

*Hinckley v. Boardman.*

RUSSEL, on an affidavit stating that in the present suit the recovery had been less than \$250; that the verdict had been set aside on payment of costs, which had been taxed at those of this court, and paid over, moved, on the part of the defendant, that the taxation should be reviewed, and every thing received beyond the costs of the common pleas, returned.

*Shephard*, contra, read an affidavit, stating, that after the rule to set aside the verdict had been obtained, he, as attorney to the plaintiff, made out the bill of costs, and submitted it to Mr. *Russel*, who made objections to some *items*, all of which were immediately struck out. That notice of taxation was then duly served, but no person attending on behalf of the defendant, the bill was taxed *ex parte*, the costs received, and the allowance for the attendance of witnesses actually paid to the plaintiff.

SPENCER, J. When the motion was made for a new trial, we were asked to grant a favour; the terms on which we would accord it, were in our discretion,

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and had costs been mentioned, we ought, in my opinion, to have allowed those of this court. Aug. Term, 1805.

THOMPSON, J. I do not think so. The rule was intended to be on payment of legal, taxable costs. It is not to be supposed, that a plaintiff should, on a defence, recover more than on a default.

LIVINGSTON, J. When interlocutory matters are set aside, we ought not to look forward to what might be recovered, or back on that which has been; supreme court costs appear to me the most proper to be awarded.

TOMPKINS, J. I conceive when the verdict was set aside, it was on payment of such costs as were legally due. But I consider the defendant, by not attending the taxation after service of a copy of the bill of costs, to have waived all opposition to their amount.

KENT, C. J. He should have appeared and contested the taxing. His not doing so is a waiver of his right. Had it been otherwise, I should think the costs of the common pleas only were recoverable, though we certainly might have allowed supreme court costs had we pleased so to do. As things are, you can take nothing by your motion, and must pay the costs of resisting.

*Witmore v. Russel.*

ON an application for judgment, as in case of nonsuit, the defendant wished to include, in the costs

Aug. Term, first *Monday* in this *August*, and had not, therefore,  
1803. given notice of retainer.

*Van Vechten*, contra, stated the writ to have been  
returnable in *May*.

*Per Curiam*. Take your motion, on payment of  
costs and pleading issuably.

*Van Drisner v. Christie.*

IN dower, and all real actions, judgment cannot  
be entered without motion in open court.

*William Meiks v. Noadiah Childs.*

THE clerk cannot give up bonds filed for security  
for costs in an action where a non-resident is plaintiff;  
the application must be to the court, and the  
affidavit on which it is founded should state the due  
taxation of costs, the name of the surety, and the  
non-residence of the plaintiff.

*Benjamin M. Mumford v. Peter A. Cammann.*

THIS was an application to change the *venue* from  
the county of *Kings*, to the city and county of *New-York*,  
on an affidavit, that all the witnesses of the  
defendant resided in the city of *New-York*.

*Per Curiam*. The rule we have laid down, as to  
allowing the defendant to bring back the *venue*, when  
his witnesses reside in the county to which it is to be

removed, and the plaintiff does not show he has any Aug. Term,  
where it is laid, cannot apply to a case like the pre- 1805.  
sent. The court-house of the county of *Kings* is  
so contiguous to the city of *New-York*, that there is  
no hardship in carrying witnesses from one place to  
the other. There is hardly a county in the state, in  
which the witnesses who attend a trial, do not travel  
further than they will in the present suit. Take  
nothing by the motion.

*Jackson, ex dem. Cramer, v. Stiles, Williams  
Tenant.*

ON motion for an attachment for not paying costs,  
on account of the plaintiff's being nonsuited, for want  
of confessing lease entry and ouster, the affidavit  
must state, that the person demanding them of the  
tenant, was duly authorised by the lessor of the plain-  
tiff, according to the *English* practice.\*

\* *Ran. 21st.*  
415.

*Brandt, ex dem. McCleland, v. Burrows.*

SCOTT insisted, that the notice of motion for  
judgment, as in case of nonsuit, was waived by giv-  
ing subsequent notice of an application for a com-  
mission.

*Per Curiam.* The defendant knew you were en-  
titled to stipulate; he, therefore, comes prepared, if  
you do that, to make his other motion. If you elect  
to have judgment of nonsuit against you, it is in your  
power. If not, you must stipulate, and then the  
motion for the commission will be granted.

Aug. Term,  
1805.

*Jackson, ex dem. Lawyer, v. Stiles, Palmitier Tenant.*

QUACKENBOS objected to the notice of motion to set aside proceedings against the casual ejector, and that the tenant might be admitted to defend, because it was subscribed "attorney for the tenant."

*Per Curiam.* There is nothing in the objection.

*Stephen Reynolds v. Daniel Bedford.*

*Daniel Herrick v. Daniel Bedford.*

ON a *certiorari* in these causes to a justice's court, the errors relied on were, that in one it appeared on the face of the record, the justice overruled a demurrer to evidence, without any demand of judgment from the opposite party, on his having joined in it; till which period, it was contended, there was no issue in law. That in the other, the constable, though said to be *duly* sworn, appeared not to have been so, as the oath set out was only, "to attend the said jury, "and to keep them together in a private place, until "they had agreed on their verdict;" and that in both cases the witnesses were sworn "to maintain the action," instead of "to declare the truth."

*Cadey* for the plaintiff, on the first point, cited 4 Bac. Abr. 137.\* and on the last, *Day v. Wilber, ante*, p. 381.

\* Old edition.

*Per Curiam.* In the first of these causes we think Aug. Term,  
there is no error in the point relied on. The justice, \_\_\_\_\_  
in our opinion, was correct in overruling the demurrer. The act conferring jurisdiction to justices  
of the peace, gives to either party the right of trial by  
jury; and, when it is considered generally, that the  
justices cannot be much acquainted with the science  
of the law, it cannot be important to the parties litigant,  
to draw the examination of facts from the jury,  
to the court. An act of the last session enables  
every party aggrieved to obtain a special return of  
the facts;\* and this we think ought to supersede  
demurrers to evidence. They are frequently inter-  
posed to entangle justice in the nets of the law; and  
we mean to be understood, that the inferior magistrate  
rightly overruled it, on the ground, that it is a  
proceeding inapplicable to suits under the "act for  
"the more speedy recovery of debts to the value of  
"twenty-five dollars." The judgment in that cause  
must, therefore, be affirmed. In the second, it  
must be reversed, agreeably to the decision in *Day v. Wilber*. For the justice has undertaken to set  
forth the oath he did administer; and as it is mate-  
rially variant, the word "duty," cannot be of any  
avail.

\* 4 Stat.  
Laws, 476.  
ch. xciii.

*Given v. Driggs.*

AFTER a new trial had been ordered in this cause, the plaintiff, on the 30th of June, 1804, personally served the defendant with a written notice of it, requiring him to appoint a new attorney, as his former one had been promoted to the bench, and that in default of so doing, all subsequent notices would

Aug. Term, 1805. be served by affixing the same in the office of the clerk of the court. The defendant not having nominated any new attorney, the plaintiff gave notice of trial in the manner above mentioned, and, at the last *Albany* circuit, took an inquest by default, upon which judgment had been entered and execution sued out.

*Williams*, on the above facts, now moved to set them aside, contending that the notice to appoint a new attorney, ought to have been by a rule of court ordering it to be done.

*Per Curiam.* In the case of *Bennet* ads. *Vielie*, July term, 1802, it was decided, that the party must be warned or he is not bound to take notice of the proceedings, and in *Harvey* ads. *Hiddrith*, January term, 1803, we ruled that the defendant must have personal notice, or such as the court would deem tantamount. Our statute, like that of Hen. IV. requires a warning, and the personal service here, was a sufficient one, without any rule of court. The defendant was grossly in default, as nine months elapsed before the plaintiff went on. We think 30 days a sufficient and reasonable notice in these cases. You can, therefore, take nothing by your motion.

*Beadle v. Hopkins.*

IN covenant, under a plea of performance, the defendant gave notice of special matter, and the judge at the trial permitted equitable evidence to be given upon which a verdict was taken for the defendant.

The application was to set it aside and grant a new trial: Aug. Term,  
1805.

*Per Curiam.* The motion must be granted with costs, to abide the event of the suit. Under the plea in this cause, the notice was inadmissible, and the evidence, therefore, improperly received. The statute requires the general issue to be pleaded, where special matter is relied on in evidence, under the notice our law permits.

*Tower v. Wilson, Sheriff of Washington.*

SHEPHARD moved in arrest of judgment on the following grounds: 1st. That there was a variance between the issue roll and *nisi prius* record; the memorandum in the first being of *January* term, 1803, and that of the latter in 1804. 2d. That there was no special suggestion, that the sheriff of the county was interested, and no special award to the coroner, who appeared to have returned the *venire*.

*Foote*, contra, was stopped by the court.

*Per Curiam.* The issue roll is allowed to be correct, and the circuit record is always amendable by it, on payment of the costs of the motion made. The second error is within the spirit of the statute of *jeo-fails*, which, after verdict, cures the award of a *venire* to an improper officer, on an insufficient suggestion; *a fortiori* if the award be to the right person. Take nothing by your motion.

Aug. Term,  
1805.

*Jackson, ex dem. Colden, v. Brownell.*

WOODWORTH moved to discharge a judge's certificate to stay proceedings, because the plaintiff had not brought on the cause to argument this term, according to notice, though there had been ample opportunity. He contended, that the certificate expired with the term, if the party obtaining it neglected to bring on the argument.

*Per Curiam.* When the cause is of such a nature, that either side may notice for argument, both are equally in default if it be not brought on. The only mode in such a case to get rid of a judge's order, is to give a counter notice, and when the cause is called on the calendar, to come forward and demand judgment. Here each party has noticed, and neither one has moved; the application must, therefore, be denied. Had the cause been such, that both parties could not have noticed, then the present motion would have been right.

*Anonymous.*

A SIMILAR application was made to vacate a judge's certificate to stay proceedings, upon a report of referees.

*Per Curiam.* Take your motion. This case comes exactly within the exception in the last.

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*William Pinder v. John I. Morris.*

Aug. Term  
1805.

WILLIAMS moved to set aside the judgment and execution in this suit, or to enter up satisfaction on the judgment obtained therein on a sealed note, upon production of a written discharge from the plaintiff, containing a complete release of all demands, costs, &c. and a receipt for the balance due, which the defendant swore he paid in full consideration of the note, and without knowing that any third person had an interest therein.

Tiffany objected to the application, because the attorney had a *lien* on the debt for his costs, and might by this species of settlement be cut out. He contended also, that the rule would be ineffectual, as the judgment entered was against *Morrison*, and the order of court would be in a suit where the defendant was named *Morris*.

*Per Curiam.* From the case of *Welsh v. Hole*, Doug. 238. sanctioned by *Mikhell v. Oldfield*, 4 D. & E. 123. and *Read v. Dupper*, 6 D. & E. 361. if the defendant pay to the plaintiff debt and costs, after notice from the attorney of the plaintiff not to do so, he pays the costs in his own wrong, and Lord Mansfield said, the court could not go further. If the adverse party applied to the court to cancel the judgment by a set-off, then the court would take care that the attorney's bill should be paid. In the case of *Spencer v. White*, April term, 1799, the court qualified the right of the plaintiff's attorney, even in the

Aug. Term, 1805. case of a set-off. The present motion must, therefore, be granted, as there is no pretence of notice to the defendant, or of any collusion between him and the plaintiff, to deprive the attorney of his costs. As to the variance between the names, this is a rule granted in the cause of *Pinder v. Morris*, and it will never be an authority for entering satisfaction on a judgment in one against *Morrison*.

*Peck v. M'Alpine.*

ON *certiorari*, the plaintiff relied on the justice's having adjourned for more than six days.

*Per Curiam.* It appears to have been so done on his own request; he is, therefore, estopped from alleging it for error.

*Hugh Moore v. Roswell Ames.*

ON *certiorari*. The suit before the justice, was to recover back a fine of \$ imposed by the now plaintiff upon the present defendant, for a contempt in refusing to be sworn, or answer as a witness in a cause tried before him.

*Per Curiam.* A justice is not liable to a suit for a judicial act, and the merits of the imposition of the fine, cannot be overhauled before another justice. The magistrate in the first suit had exclusive jurisdiction to determine when the witness was in contempt.

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*Daniel B. Bradt v. John George Cray.*

AUG. TERM,  
1805.

A BILL for exceptions had been sealed by the judges of the *Common Pleas*, and the parties attempted to bring on the argument, though no writ of error had been sued out.

*Per Curiam.* Take back your cases. There is no *lis pendens*.

*Nathan Leonard v. Eli Freeman.*

IT appeared on the return to the *certiorari*, that the action in the court below, and in which a recovery had taken place, was instituted for expenses incurred in going to Albany, to swear to an answer to a bill filed by the now plaintiff, against the present defendant.

*Per Curiam.* The judgment must be reversed. The court of chancery has the exclusive right to determine questions of costs in the suit before it; and though the ground of the action might have been a vexatious bill, the justice could not have any cognizance.

*Colden v. Dopkin.*

KENT, C. J. This is a case upon *certiorari*, brought to reverse a justice's judgment, and submitted without argument. Several errors are alleged in the proceedings below, but it will be sufficient to notice only, that the justice adjourned the cause for

Aug. Term, more than six days without consent. The return  
1805. states, that the defendant below was sued by summons, which was returnable on the 26th of *July*; that the parties appeared on that day and pleaded; that the plaintiff below prayed a day to prove his account, and the justice thereon adjourned the court to the 2d of *August*, on which day the plaintiff appeared in court, and the defendant was present, but said nothing, whereupon the justice, after hearing the proofs and allegations of the plaintiff, gave judgment for him.

Upon this case the justice had no authority to adjourn for more than six days after the day of appearance of the parties on the summons. The 2d section of the £10 act is positive that the justice shall, upon the return of the summons, or at some other time, *not exceeding six days thereafter*, proceed to hear the cause, and in the present instance, the 2d of *August*, was the 7th day thereafter. There are other provisions in the act respecting adjournments; but none of them have any application to the present case, and there is nothing in the return from which we can presume any consent or acquiescence on the part of the defendant. The return contains pretty strong evidence to the contrary. On the day of the return of the summons, the defendant pleaded a special plea, and the plaintiff refused to reply, but called upon the defendant to plead the general issue; which he refused to do, and then the adjournment took place at the prayer of the plaintiff; and on the day of adjournment, the defendant took no part in the proceedings, but remained a silent spectator. On this ground, therefore, of an adjournment beyond the time authorised by the act, the judgment below

must be reversed ; for where the act is positive in its directions, it must be strictly observed. The same point arose, and was determined in the case of *Palmer v. Green*, in *April term, 1799*, and that decision being in point, governs the present.

*Broome v. Beardsley.*

COVENANT on a sealed note, with a plea of *non infregit conventionem*.

At the trial, after the jury were called, and placed in the jury-box, the defendant tendered a plea duly verified by affidavit, that he had *puis darrein continuance*, under the act for giving relief in cases of insolvency, obtained his discharge, an exemplified copy of which he produced. This being rejected as coming too late, he then offered in evidence, the discharge itself, as a bar to the plaintiff's right of recovery. Against the reception of the testimony, it was insisted, that it was not admissible under the issue joined, nor without having been specially pleaded, or notice given. The points being reserved, a verdict was taken subject to the opinion of the court, whether it should stand or a new trial be granted.

*Woodworth* for the plaintiff.

*Root*, contra.

*Per Curiam*, delivered by SPENCER, J. The case of *Paris v. Salkeld*, is decisive that a plea *puis darrein continuance* is matter of right; and, if verified

Asg. Term, by affidavit, the judge at *nisi prius* has no discretion  
1805. to accept it or not, but is bound to admit it.

There is no *dictum* to be met with that the plea was too late. In the case of *Pearson v. Perkins*, cited in *Buller's Nisi Prius*, 310. it was helden that it might be pleaded after the jury are gone from the bar, but not after they have given their verdict. The facts to warrant this plea, must have happened since the last, and before the next continuance. The last continuance is the return day of the *venire facias*, where the proceedings are in the ancient method; the next continuance is the first day in bank thereafter, or the first day of the succeeding term. Continuances are from term to term. We are all of opinion that the plea was well pleaded and ought to have been received. The verdict must, therefore, be set aside without costs, and the plea tendered be filed *nunc pro tunc*, and be deemed parcel of the *nisi prius* record.

*David Tower v. Nathan Wilson.*

THE only point was, whether a party who has served a notice, without keeping a copy of it, might give parol evidence of its contents ?

*Per Curiam.* There was a notice served on the defendant to produce a *fi. fa.* on the trial, or that the plaintiff would prove it by parol. It appears that no copy of this notice was kept. We think it might be proved by an affidavit of its contents. In this instance there is no other way to establish it, and the defendant has it in his power, by producing the

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original, to correct mistakes. In *Tidd's* forms, no. <sup>Aug. Term,</sup> 1805. notices are proved by affidavits of the substance of their contents.

*Haff v. Spicer and Potter.*

STARR took an exception to the affidavit on which the defendant moved, because it was not subscribed by him.

*Per Curiam.* It begins with his name, and that is sufficient.

*Schermerhorn v. Schermerhorn.*

IN this cause a judgment in the common pleas was allowed to be set off against one recovered in this court.

*Haughtalling v. Bronk.*

VAN VECHTEN on an affidavit in a writ of right, setting forth that one of the electors returned on the grand assize, had left the state, moved to amend the panel by adding another.

*Per Curiam.* As there is no opposition take your rule.

THOMPSON, J. I do not see how it is possible for the court to grant the motion. If they do, the elector will be appointed contrary to the act, and all proceedings under such a panel consequently void. My opinion is, that you should have a new elector

Aug. Term, 1805. appointed in the same way as the others. I think we have a power to order the sheriff to summon another panel; but I do not think we can direct another elector to be added.

*John D. Petrie v. Jewit Woodworth.*

IN error on *certiorari*, the exceptions were, 1st. That the defendant below pleaded in abatement, a *mismomer*, in being sued as *Petris*, instead of *Petrie*. 2d. That the declaration was uncertain and insufficient.

*Per Curiam.* It was not a *mismomer*. It was the same surname, with the mis-spelling of one letter.—The pronunciation would still be the same in *French*, as the name seems to import. It may also be well inferred from the return, that it appeared to the justice, that the defendant was as well known by one name as the other, if they be different; and such a replication to such a plea is good. The second objection has no weight. The declaration is good enough. It was "for damages, on account of the defendant's not fulfilling a contract for a certain lot of lease land, lying in *German Flats*." We are of opinion that the judgment be affirmed.

*Gabriel Manny v. James Dobie.*

ON *certiorari*. The defendant below refused to plead, on which the justice awarded a *venire*, which was now assigned for error.

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*Per Curiam.* The judgment must be reversed. Aug. Term,  
The award of a *venire* was erroneous. It cannot be \_\_\_\_\_  
done on a judgment by default, or where the defendant  
does not plead. An issue must be joined.  
1805.

*The People v. Smith.*

PENDLETON having on a former day obtained a rule to show cause why an attachment should not issue against the defendant, for appropriating money collected for his client, who was in prison, now moved to have it made absolute, and in support of the application cited *Say.* 51. 169. 4 *Burr.* 2060. *Stra.* 621. and 1 *Burr.* 654.

Woods, contra, insisted the proceeding was unwarranted ; that the money was retained for costs and other demands, and if such a measure was adopted, it would be placing an officer of the court in a worse situation than any other citizen, as he would thus lose the benefit of a trial by jury.

*Per Curiam.* There is no doubt of the authority of the court to proceed against attorneys, for misbehaviour in this summary way. The case in *Say.* 169. is in point. The defendant's conduct has been so very improper, that we are bound to interfere.— We accordingly, by a special rule, direct that he exhibit to the clerk of the court, in *New-York*, within ten days, his counter demands for costs, and, if any balance appear due on liquidation of the accounts, that he pay it in twenty days, or the attachment issue.

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1805.

NOVEMBER TERM, 1805.

*James Cheetham v. Zachariah Lewis.*

EVERTSON moved to set aside the declaration, and stay all further proceedings, because, though the writ was returnable in *November*, 1803, the plaintiff had not filed and delivered his declaration till *September* last. He contended, that by the rules of the common law, a plaintiff was obliged to declare within the year, and if he did not do so, he was *ipso facto* out of court. If some limitation of this sort was not in force, a cause might be hung up *ad infinitum*. In support of the application, he cited 2 *D. & E.* 112. and particularly the reasoning of Buller, J.

*Van Wyck*, contra, argued that the only mode of putting a plaintiff out of court, was, by a rule to declare, or be *nonprossed*.

*Per Curiam.* There is no such rule of practice in this court as that insisted on by the defendant. It is in his power to *nonpross* the plaintiff if he pleases ; if he does not, the plaintiff may declare at any time. The decision, however, in this case, will not apply to a suit removed by *habeas corpus* ; for there, as the defendant cannot *nonpross*, he is not bound to plead.

Nov. Term,  
1805.

*Lenox, Maitland and Renwick v. Howland, Russell  
and others.*

THE plaintiffs had, under the act authorising proceedings against absent debtors, procured, on the usual oath, an attachment against the property of the defendants, who resided in *Massachusetts*.— They, by affidavit, set forth, that they never had any *dealings* with the plaintiffs, who, as shippers of property on board the ship *Ocean*, belonging to the defendants, claimed compensation for damage the goods had sustained in consequence of the vessel's having been run ashore when going up the harbour of *Liverpool*, by alleged negligence or misbehaviour of the captain, whereas the injury, if any, arose from the conduct of the pilot.

*Colden* and *Riggs*, on these facts, moved to supersede the attachment, notice of which had been duly published. They contended, that the debts contemplated by the act, were such as might be set off, the words of the statute being, that the demand must be \$100 above, or clear of *discounts*. Torts and unliquidated damages, therefore, not within the purview of the law, because of them no set-off can be made. *Bankrupt Act*, sec. 34. *Coop. Bank. Law*, 160. 224. 244. *Sell. Prac.* 42. *Brown v. Cumming*, 2 N. Y. T. R. 33. But allowing such a claim might be set off, the pilot, they said, was answerable. *Malyne*, 59. 7 D. & E. 160. They referred also to the decision of this court, in the matter of *Fitzgerald*, an absent debtor, 2 N. Y. T. R. 318.

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1805.

*Hoffman and Harison*, contra, argued that the court had no jurisdiction in the summary way, as the act had chalked out the only mode of proceeding by which a *supersedeas* could be obtained. That as to the matter of the claim being without the statute, the 21st sec. had ordered a bond to be given, to appear and plead to any action, and the terms of the condition were broad enough to include all cases, excepting *pure torts* alone ; even to appear and answer to a bill in equity. To support the attachment, the oath of the plaintiffs is all that is required, and cannot be done away by a counter deposition from the defendants. It would be to try the cause by affidavit, and determine preliminarily, the fact of debt or no debt. Whether the pilot or master were to blame, was not to be now investigated.

*Per Curiam*, delivered by SPENCER, J. We do not think that because the statute points out a particular mode, by which a *supersedeas* may be obtained, we are ousted of jurisdiction in this state of the case. We conceive that, from the general superintending power of this court, we have a right to examine, whether the attachment has not improvidently issued, and on this ground, review the order of the judge by whom it was directed. On the present occasion, the plaintiffs have not contradicted the affidavit of the defendants, but, resting their opposition on the matter it details, have reposed themselves on its contents. Exercising, then, that right of controul which we think we possess, we cannot but see, that the plaintiffs have failed in showing such a debt as is within the purview of the act. The statute applies only to those which are capable of being set off, not to demands

which arise from torts, or *ex deketo*. As, therefore, Nov. Term,  
1805. the claim of the plaintiffs is stated to be of this nature, proceeding from the misfeasance of the captain, and this is not denied by the opposite party, the motion must be granted ; but with permission, however, to the plaintiffs, to show any day within term, that they have a debt such as is within the purview of the act.

KENT, C. J. I am against the motion, because I think the only remedy is under the 21st section of the act, which, in my opinion, is fully sufficient. If the bond there directed, be given, the question whether debtor or not, within the statute, can be decided ; for the instrument can apply only to debts within the law. The proceedings below are regular, and on that score we have, therefore, no right to interfere.

THOMPSON, J. I concur in the opinion of the Chief-Justice.

*John M'Vickar v. Oliver Woolcot.*

HOPKINS, in consequence of the death of a witness to be examined on a commission sent to *England*, and sued out early in the last spring, moved, on behalf of the defendant, to amend by inserting the name of a new witness, who could prove the fact the testimony of the deceased would have gone to establish, or to be at liberty to issue a new commission.

*Per Curiam.* Were we to permit the amendment, the opposite party might lose the benefit of cross-examining ; for the interrogatories exhibited to one, might not be proper to administer to another, from

## CASES OF PRACTICE

Nov. Term, whom it might be wished to extract new evidence.  
1805.

The first part of the motion must, therefore, be denied; but you may take a new commission at your peril, without, however, any stay of proceedings on the part of the plaintiff.

*Cook and others v. Campbell and Loraine.*

IN debt on recognizance of bail, the defendants pleaded, 1st. *Nul tiel record.* 2d. That the *ca. sa.* against the principal was not duly issued. The plaintiffs replied, taking issue on both pleas.

Under these circumstances, the plaintiffs gave notice of bringing on the trial by record, and the defendants of setting aside the whole proceedings, for irregularity in the *ca. sa.*

Both motions came on together, and the record being admitted, judgment was demanded, against which the defendants relied on the irregularity, to prevent its being allowed.

*Boyd*, for the defendants, insisted, that to warrant any proceedings against bail, there must be eight days between the teste and return of the *capias ad satisfaciendum*. 1 *Sell. Prac.* 550. 2 *Salk.* 601. *Ball v. Manucaptors of Russell*, 2 *Ld. Ray.* 1176. *S. C.* This objection appearing on the face of the record, was, he urged, a sufficient reason for refusing the application for judgment; and though the matter ought not to have been availed of by plea, still that informality would not prejudice. In favour of bail the

court go great lengths, and 1 *Black.* 74. would be <sup>Nov. Term,</sup> 1805. found a stronger case than the present.

*Van Wyck*, contra. There cannot be any cause assigned for the practice mentioned. The writ has lain four days in the sheriff's office, and is all which is requisite.

*Per Curiam.* The plaintiffs must have their judgment, and the motion on behalf of the defendants be denied. There is no such practice of this court, as that of requiring eight days between the *testo* and return of the *ca. sa.* nor is there any reason why it should be necessary.

*Van Winkle v. Ketcham.*

THE court decided in this cause that the promissory note of an infant, carrying on trade as an adult, could not be enforced against him by the payee, who had taken it in the course of business, without knowing the defendant's nonage.

*Lenox, Maitland and Renwick v. Howland, Russel and others.*

THE court having on a former day allowed the plaintiffs to show that they had such a demand against the defendants as would warrant the attachment,

*Hoffman* now read an affidavit, by which it appeared, that their claim was founded on the contract con-

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1805.  
ever appeared to me a very fallacious mode of testing  
questions of this kind. From the whole tenor of the  
act it is very evident, whatever may be the phraseo-  
logy of its first clause, that its design was to place the  
property of a debtor in trustees for the payment, not  
solely of *debts* within the legal acceptation of that  
term, but of every demand contracted against his  
estate, as well those due to the attaching party, as to  
others, and in like manner to give the trustees a reme-  
dy as broad, against third persons. If we once begin  
to refine or make nice distinctions on this subject, no  
one can say where we shall land. The act will soon  
be repealed, or become a dead letter. As this de-  
mand then is founded on contract, it can be of no im-  
portance in what way the injury arose, nor can we say  
it is of a kind not to support the attachment. The  
*supersedeas* is, therefore, denied.

END OF CASES OF PRACTICE.

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